Supreme Court, U.S.
FILED

No. 091160 MAR 22 2010

OFFICE OF THE CLERK

In The
Supreme Court of the United States

J.P. MORGAN CHASE & CO.,

Petitioner,

v.

ANDREW WHALEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

HOWARD M. RADZELY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
202.739.3000

CARRIE A. GONELL
MORGAN, LEWIS & BOCKIUS LLP
5 Park Plaza, Suite 1750
Irvine, California 92614
949.399.7000

R. TED CRUZ
Counsel of Record
ALLYSON N. HO
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4000
Houston, Texas 77002
tcruz@morganlewis.com
713.890.5000

SAMUEL S. SHAULSON
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, New York 10178
972.423.3131

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The Fair Labor Standards Act ("FLSA") requires employers to pay overtime to certain classes of employees who work more than 40 hours a week. The Act exempts, however, workers "employed in a bona fide executive, administrative, or professional capacity." In the past, some courts have used an analytical tool dubbed the "administrative-production dichotomy" to help determine whether workers qualify for the administrative exemption. But the Department of Labor has expressly concluded that because the dichotomy "is difficult to apply uniformly in the 21st century workplace," it was never meant to be controlling and should be used "*only* to the extent that it clarifies the analysis." 68 Fed. Reg. 15,560, 15,567 (Mar. 31, 2003); 69 Fed. Reg. 22,122, 22,141 (Apr. 23, 2004) (emphasis added).

The questions presented are:

1. Whether the Second Circuit, in conflict with decisions of the Seventh and Ninth Circuits and with controlling Department of Labor regulations, erred in treating the administrative-production dichotomy as conclusive in determining whether an employee's job duties are administrative and therefore exempt from FLSA overtime requirements.

QUESTIONS PRESENTED – Continued

2. Whether the Second Circuit, in conflict with decisions of the Sixth, Seventh, and Eighth Circuits and with controlling Department of Labor regulations, erred in holding that paying an employee additional compensation beyond the employee's salary can invalidate an otherwise applicable exemption from FLSA overtime requirements.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner is JPMorgan Chase Bank, N.A. (incorrectly named below as "J.P. Morgan Chase & Co."), which is not a publicly held company. Petitioner is an indirect subsidiary of JPMorgan Chase & Co., which is a publicly held company with no parent corporation, and there is no publicly held corporation that owns 10% or more of JPMorgan Chase & Co. stock. Respondent is Andrew Whalen.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties To The Proceedings And Rule 29.6 Statement	iii
Table Of Contents	iv
Table Of Authorities	vii
Opinions And Orders Below	1
Statement Of Jurisdiction	1
Statutory And Regulatory Provisions Involved	2
Statement	2
A. The Statutory And Regulatory Framework	4
B. This Litigation	7
Reasons For Granting The Petition	10
I. The Decision Below Conflicts With The Governing Department Of Labor Regulations And Creates A Serious Circuit Split	12
A. The Second Circuit's Decision Conflicts With The Controlling Department Of Labor Regulations	12
B. The Circuits Are Divided Over The Proper Role Of The Administrative-Production Dichotomy In Analyzing The Status Of Workers Under The FLSA	14

TABLE OF CONTENTS – Continued

Page

C. The Circuits Are Divided As To Whether The Payment Of Additional Compensation Can Alter An Employee's Exempt Status Under The FLSA 20

II. This Case Involves Recurring Issues Of National Importance 22

Conclusion 27

APPENDIX

Davis v. *J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. 2009) ..... App. 1

Whalen v. *J.P. Morgan Chase & Co.*, 569 F. Supp. 2d 327 (W.D.N.Y. 2008) ..... App. 20

Order Denying Petition For Rehearing And Suggestion For Rehearing En Banc, *Davis* v. *J.P. Morgan Chase & Co.*, No. 08-4092-cv (2d Cir. Jan. 22, 2010) ..... App. 34

29 U.S.C. § 207. Maximum hours ..... App. 36

29 U.S.C. § 213. Exemptions ..... App. 36

29 C.F.R. § 541.2 (2003). Administrative ..... App. 38

29 C.F.R. § 541.103 (2003). Primary Duty ..... App. 40

29 C.F.R. § 541.118 (2003). Salary basis ..... App. 41

29 C.F.R. § 541.205 (2003). Directly related to management policies or general business operations ..... App. 42

29 C.F.R. § 541.206 (2003). Primary duty ..... App. 47

TABLE OF CONTENTS – Continued

Page

29 C.F.R. § 541.208 (2003). Directly and closely related.....App. 48

29 C.F.R. § 541.214 (2003). Special proviso for high salaried administrative employees.....App. 52

29 C.F.R. § 541.201 (2009). Directly related to management or general business operations.....App. 53

29 C.F.R. § 541.203 (2009). Administrative exemption examples.....App. 54

29 C.F.R. § 541.700 (2009). Primary duty .....App. 58

29 C.F.R. § 541.703 (2009). Directly and closely related.....App. 60

Federal Register, Vol. 68, No. 61, Monday, March 31, 2003, Proposed Rules, Department of Labor, Wage and Hour Division, 29 C.F.R. Part 541, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees .....App. 64

Federal Register, Vol. 69, No. 79, Friday, April 23, 2004, Rules and Regulations, Department of Labor, Wage and Hour Division, 29 C.F.R. Part 541, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees .....App. 65

TABLE OF AUTHORITIES

Page

CASES

Acs v. *Detroit Edison Co.*, 444 F.3d 763 (6th Cir. 2006) 20

Auer v. *Robbins*, 519 U.S. 452 (1997) 4

Bothell v. *Phase Metrics, Inc.*, 299 F.3d 1120 (9th Cir. 2002) 15, 16, 26

Casas v. *Conseco Fin. Corp.*, No. 00-1512, 2002 WL 507059, at *1 (D. Minn. Mar. 31, 2002) 20

Chevron v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 4

Cohen v. *Gerson Lehrman Group, Inc.*, No. 09 Civ. 4352 (PKC), --- F. Supp. 2d ---, 2010 WL 92484 (S.D.N.Y. Jan. 7, 2010) 5

In re Farmers Ins. Exch., 481 F.3d 1119 (9th Cir. 2007) 16, 18

Fife v. *Harmon*, 171 F.3d 1173 (8th Cir. 1999) 21

Hamby v. *Associated Ctrs. for Therapy*, 230 Fed. Appx. 772 (10th Cir. 2007) 17

Harris v. *Superior Ct. of Los Angeles County*, 64 Cal. Rptr. 3d 547 (Cal. Ct. App. 2007) 22

Hendricks v. *J.P. Morgan Chase Bank, N.A.*, No. 3:08-CV-613 (JCH), --- F. Supp. 2d ---, 2009 WL 5170179 (D. Conn. Dec. 15, 2009) 5

TABLE OF AUTHORITIES – Continued

Page

Hippen v. *First Nat'l Bank*, No. 90-2024-L, 1992 WL 73554, at *1 (D. Kan. Mar. 19, 1992) 19

Icicle Seafoods, Inc. v. *Worthington*, 475 U.S. 709 (1986) 5

Kennedy v. *Commonwealth Edison Co.*, 410 F.3d 365 (7th Cir. 2005) 21

Long Island Care at Home, Ltd., v. *Coke*, 551 U.S. 158 (2007) 8, 14, 16

Reich v. *John Alden Life Ins. Co.*, 126 F.3d 1 (1st Cir. 1997) 15, 18

Roe-Midgett v. *CC Servs., Inc.*, 512 F.3d 865 (7th Cir. 2008) 14, 17, 26

Webster v. *Pub. Sch. Employees of Wash., Inc.*, 247 F.3d 910 (9th Cir. 2001) 16, 18

Whalen v. *J.P. Morgan Chase & Co.*, 569 F. Supp. 2d 327 (W.D.N.Y. 2008) 1

Whalen v. *J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. 2009) 1

DOCKETED CASES

Cohen v. *Oppenheimer & Co.*, No. 10-cv-00117 (E.D.N.Y. Filed Jan. 12, 2010) 25

Nguyen v. *BDO Seidman, LLP*, No. SACV 07-1352 JVS (C.D. Cal. Filed Nov. 15, 2007) 25

Sexton v. *Franklin First Fin., Ltd.*, 2:08-cv-04950-JFB-ARL (E.D.N.Y. Filed Dec. 9, 2008) 25

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS

28 U.S.C. § 1254(1) 2
29 U.S.C. § 201 2
29 U.S.C. § 207 4
29 U.S.C. § 213 4
29 U.S.C. § 213(a)(1) 4
29 C.F.R. § 541.0 (2003) 2
29 C.F.R. § 541.118(b) (2003) 21
29 C.F.R. § 541.2(a) (2003) 4
29 C.F.R. § 541.200 (2003) 8
29 C.F.R. § 541.201(a) (2003) 6
29 C.F.R. § 541.203(a) (2009) 19
29 C.F.R. § 541.203(b) (2003) 8
29 C.F.R. § 541.205(a) (2003) 5, 6
29 C.F.R. § 541.205(c) (2003) 5
29 C.F.R. § 541.208(c) (2003) 6, 8, 12
29 C.F.R. § 541.214(a) (2003) 4
29 C.F.R. § 541.703(b)(7) (2009) 8, 12
29 C.F.R. § 703(b)(7) (2009) 6

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Final Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004) ..... *passim*

Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 68 Fed. Reg. 15,560 (March 31, 2003) 6

DOL Opinion Letter, available at 1997 WL 998013 (DOL Wage-Hour Mar. 17, 1997) 21

Ben James, *Wage And Hour Suit Increase Picks Up Steam in '09*, LAW 360 (Jan. 10, 2010) 22

Daniel C. Lopez, *Collective Confusion: FLSA Collective Actions, Rule 23 Class Actions, and the Rules Enabling Act*, 61 HASTINGS LAW J. 275 (Nov. 2009) 23

David A. Grant & Tracey L. Allerson, *The Proliferation of FLSA Collective Actions*, LAW360 (June 28, 2007) 24

Evan Spelfogel, *Misclassification: The Profusion, The Cost, and the Remedy*, NYSBA L&E NEWSLETTER, Vol. 34, No. 1 (Spring 2009) 23

Gibson Dunn & Crutcher, *Second Circuit Issues Wage-Hour "Administrative/Production Dichotomy" Decision Out of Step with Other Circuits* (Dec. 9, 2009) 22

TABLE OF AUTHORITIES – Continued

Page

Joseph E. Tilson *et al.*, Litigating Lawsuits Under The FLSA—*The Fastest Growing Area Of Employment Litigation*, 697 PLI/LIT 649 (Oct.-Nov. 2003) 23

Joseph E. Tilson, *et al.*, *Hot Topics in Wage and Hour Law*, 802 PLI/LIT 681 (Oct. 2009) 25

Mary Swanton, *Clock Work: Wage and Hour Cases Top Employment Class Actions*, INSIDECOUNSEL (Mar. 1, 2010) 24

Michael Orey, *Wage Wars*, BUS. WK. (Oct. 1, 2007) 23

Shlomo D. Katz & William Schmidt, *Courts and DOL Downplay The "Production Versus Staff" Dichotomy*, FLSA EMPLOYEE EXEMPTION HANDBOOK NEWSLETTER (Oct. 2008) 22

PETITION FOR A WRIT OF CERTIORARI

Petitioner JPMorgan Chase Bank, N.A. ("Chase"), respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS AND ORDERS BELOW

The order of the court of appeals denying Chase's petition for rehearing and suggestion of rehearing en banc was entered on January 22, 2010, is unreported, and is reprinted in the Appendix to this Petition ("Pet. App.") at 34-35. The underlying opinion of the court of appeals was entered on November 20, 2009, is reported at 587 F.3d 529 (2d Cir. 2009), and is reprinted in the Pet. App. at 1-19. The opinion of the United States District Court for the Western District of New York was entered on August 6, 2008, is reported at 569 F. Supp. 2d 327 (W.D.N.Y. 2008), and is reprinted in the Pet. App. at 20-33.

STATEMENT OF JURISDICTION

The opinion of the court of appeals was entered on November 20, 2009, and the order of the court of appeals denying Chase's petition for rehearing and suggestion of rehearing en banc was entered on

January 22, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, and the relevant regulations of the Department of Labor promulgated thereunder, 29 C.F.R. § 541.0 *et seq.*, are set forth at Pet. App. 36-63.

STATEMENT

This case presents fundamental questions concerning the proper classification of employees under the Fair Labor Standards Act. First, the Second Circuit concluded that respondent—a salaried Chase mortgage underwriter who evaluated the creditworthiness of potential borrowers and made binding decisions totaling $2.5 billion as to whether Chase should loan money to those borrowers—was not exempt from the Act's overtime requirements. In reaching that conclusion, the court of appeals created a serious conflict not only with decisions of the Seventh and Ninth Circuits interpreting and applying the administrative exemption, but also with controlling Department of Labor regulations upon which the court of appeals purported to rely. Specifically, the court of appeals erroneously treated

as controlling a dichotomy between administrative and production work—the so-called "administrative-production dichotomy"—that the Department and other courts of appeals have squarely held should not be dispositive. Second, the court of appeals erred (and intensified the conflict) by relying upon Chase's payment of compensation in addition to respondent's base salary as evidence of non-exempt status. That created another split of authority with the Sixth, Seventh, and Eighth Circuits, all of which follow the Department's guidance in holding that paying such incentives is not inconsistent with exempt status.

In light of the deluge of wage-and-hour litigation across the Nation—particularly litigation involving the administrative exemption—this Court's review is needed now to resolve both circuit conflicts and to provide uniform guidance on the frequently recurring issue of when workers are exempt from the FLSA's overtime requirements and when they are not. As set out below, courts and commentators have acknowledged the lack of clarity concerning the administrative-production dichotomy and its role in the legal analysis, and recognized the conflict between the Second Circuit's decision in this case and the "broader trend" in the courts of appeals. See pp. 22-23, *infra*. This Court should grant the petition, dispel the confusion, and resolve the conflicts.

A. The Statutory And Regulatory Framework

Under the FLSA, employees who work more than 40 hours a week are entitled to overtime pay unless they fall within one of the FLSA's exemptions. 29 U.S.C. §§ 207, 213. Congress has empowered the Secretary of Labor to define and delimit the terms of the FLSA's exemptions by regulation. 29 U.S.C. § 213(a)(1). The Secretary is "free to write the regulations as broadly as [she] wishes." *Auer* v. *Robbins*, 519 U.S. 452, 463 (1997). The Secretary's regulations, which were promulgated using notice-and-comment procedures, have controlling weight unless found to be arbitrary, capricious, or manifestly contrary to the statute. See *Chevron* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

Under the administrative exemption, anyone employed in a bona fide administrative capacity is exempt from the FLSA's overtime requirements. 29 U.S.C. § 213(a)(1). The Department has defined an administrative employee as someone who (1) is paid a salary of at least $250 a week, and whose primary job duty is (2) related to "management policies" or "general business operations," and (3) includes the exercise of discretion and independent judgment on matters of significance. 29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.2(a) (2003) & 541.214(a) (2003).[1] Whether an

---

[1] In August 2004, the Department issued new regulations regarding the administrative exemption. Aside from increasing the minimum salary requirement to $455 per week, those regulations did not make any substantive change to the test for the

(Continued on following page)

employee's duties qualify for the exemption is a question of law. *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986).

Of central importance here, the "management policies" or "general business operations" requirement of the administrative exemption refers to the type of work performed by the employee. Exempt work is directly related to assisting with running or servicing the business, and does not include working on a manufacturing production line or selling a product in a retail or service establishment. 29 C.F.R. § 541.205(a) & (c) (2003). Exempt work "include[s] [employees] * * * whose responsibility it is to execute or carry out [management policies]." *Ibid.* The

---

administrative exemption. See *Final Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,145 (Apr. 23, 2004). Because respondent was employed by Chase before August 2004, the petition (like the court of appeals' opinion) cites the pre-2004 regulations unless otherwise indicated.

Notably, the precedential value of the Second Circuit's decision is not limited to cases involving the pre-2004 regulations. See, *e.g.*, *Hendricks* v. *J.P. Morgan Chase Bank, N.A.*, No. 3:08-CV-613 (JCH), — F. Supp. 2d —, 2009 WL 5170179, at *13 n.21 (D. Conn. Dec. 15, 2009) (applying the Second Circuit's decision in analyzing the administrative exemption under current regulations); see also *Cohen* v. *Gerson Lehrman Group, Inc.*, No. 09 Civ. 4352 (PKC), — F. Supp. 2d —, 2010 WL 92484, at *9 (S.D.N.Y. Jan. 7, 2010) (same in certifying FLSA collective action, and explaining that under the Second Circuit's decision, "job responsibilities generally fall under the label of either 'administrative' or 'production' ").

regulations expressly provide that making decisions about extending credit is exempt work. *Id.* at § 541.208(c) (2003); 29 C.F.R. § 703(b)(7) (2009).

The regulations distinguish "activities relating to the *administrative* operations of a business * * * from '*production*' or, in a retail or service establishment, 'sales' work." 29 C.F.R. § 541.205(a) (2003) (emphasis added). Because courts have struggled with this "administrative-production dichotomy," as it is called, the Department sought in the 2004 amendments to the regulations to clarify that the dichotomy was never meant to be controlling, but just one factor in determining whether a worker qualifies for the administrative exemption. 29 C.F.R. § 541.201(a) (2003). A significant part of the debate surrounding the 2004 amendments revolved around the administrative-production dichotomy. See *Final Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,140-41 (Apr. 23, 2004).

In the end, the Department determined that in the "modern workplace," the administrative-production dichotomy should not be used as "a dispositive test for exemption." *Ibid.* Rather, it is "but one piece of the larger inquiry," "a relevant and useful tool in appropriate cases" that should be used "*only* to the extent that it clarifies the analysis." *Ibid.* (emphasis added); see also *Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*,

68 Fed. Reg. 15,560, 15,566 (March 31, 2003) (stating that the dichotomy "is difficult to apply uniformly in the 21st century workplace" and therefore "[t]he proposed rule would * * * reduce the emphasis on the so-called 'production versus staff' dichotomy in distinguishing between exempt and non-exempt workers"). The dichotomy is only determinative, the Department made clear, "if the work falls *squarely* on the production side of the line." 69 Fed. Reg. 22,122, 22,141 (Apr. 23, 2004) (emphasis added).

B. This Litigation

Chase is a financial services company that, among other things, offers home equity lines of credit, loans, and mortgages. To minimize risk, Chase employs underwriters such as respondent to evaluate the creditworthiness of potential borrowers. Underwriters do not develop or create the financial products that Chase offers to customers. Nor do underwriters sell those products to customers. Rather, respondent made binding credit decisions on Chase's behalf with authority of up to $500,000 per loan—$2.5 billion in the aggregate.

In 2001, respondent joined a collective action against Chase for failure to pay overtime under the FLSA. After discovery, the parties filed cross-motions for summary judgment on the issue whether respondent was classified properly as an administratively exempt employee under the FLSA. Based upon the undisputed facts, and relying upon the regulation specifically addressing employees like respondent

who make credit decisions, the district court held that his primary duties were administrative:

> [Respondent's] duties, which primarily include "collecting and analyzing information regarding customer's income, assets, investments or debts," making "decisions to exceed or otherwise vary these limits in the case of particular customers," and otherwise upholding Chase's [c]redit [p]olicy, are clearly "office, non-manual work directly related to management policies or general business operations of the employer."

Pet. App. 27. (citing 29 C.F.R. §§ 541.200 & 203(b) (2003)). Concluding that Chase had carried its burden of proving that respondent was an exempt administrative employee as a matter of law, the district court denied respondent's motions for summary judgment, granted Chase's cross-motion for summary judgment, and dismissed the complaint with prejudice. Pet. App. 32.

On appeal, the Second Circuit reversed. The panel concluded that respondent was a production worker rather than an exempt administrative employee. In reaching its conclusion, the court of appeals *made no reference at all* to the regulation specifically addressing employees, like respondent, who make credit decisions (and are generally exempt). See 29 C.F.R. § 541.208(c) (2003); 29 C.F.R. § 541.703(b)(7) (2009); see also *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 170 (2007) (noting that "normally the specific governs the general" and holding that more

specific regulation promulgated under FLSA governed). Instead, the court applied the more general administrative-production dichotomy (Pet. App. 13-15), which the Department's regulations say should not be controlling in determining whether an employee performs administrative work.

Relying upon that dichotomy nonetheless—and to the exclusion of more specific regulations—the court of appeals concluded that an employee cannot be administratively exempt if his or her work "concerns" the "production" of the product or service offered by the employer. Pet. App. 12 (stating that the work of underwriters is not exempt because it "concerns the 'production' of loans—the fundamental service provided by the bank"). And, even using that dichotomy, the court of appeals made no determination that respondent's primary duty as a mortgage underwriter falls "squarely" on the "production side of the line," as the Department's regulations require. See 69 Fed. Reg. 22,122, 22,141 (Apr. 23, 2004).

In concluding that respondent was a production worker rather than an exempt administrative employee, the court of appeals stressed the importance of Chase's payment of incentives to respondent over and above his base salary. Pet. App. 13 ("Paying production incentives to underwriters shows that Chase believed that the work of underwriters could be quantified in a way that the work of administrative employees generally cannot."). The court of appeals also drew a distinction between employees who evaluate credit for tangible goods (and, thus, would

be exempt), and employees who, like respondent, evaluate credit for loans (and would not be exempt, in the court of appeals' view). *Id.* at 14.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision conflicts with decisions of the Sixth, Seventh, Eighth, and Ninth Circuits. It conflicts with controlling regulations promulgated by the Department of Labor. And it is wrong, and will have dire consequences for an entire swath of the Nation's industries.

On the question whether the administrative-production dichotomy is controlling, the Second Circuit has created a 2-1 circuit split with the Seventh and Ninth Circuits. On the question of whether payment of additional compensation renders exempt employees non-exempt, the Second Circuit has created a 3-1 circuit split, with the Sixth, Seventh, and Eighth Circuits.

And on both questions, the Second Circuit has created an irreconcilable conflict with the governing Department of Labor regulations, issued after careful consideration and notice-and-comment rulemaking. The conflict is threefold: *First*, the regulations expressly provide that individuals evaluating credit and making credit decisions are exempt employees. The court of appeals did not even cite this controlling regulation, and its decision is directly to the contrary. *Second*, the Department of Labor has expressly concluded that the administrative-production dichotomy

should not be conclusive, citing with approval the Ninth Circuit decision holding the same. The Second Circuit concluded directly to the contrary. And *third*, the regulations expressly provide that the payment of additional compensation will not transform exempt employees into non-exempt employees. The court of appeals concluded to the contrary.

In addition to these serious conflicts, if left undisturbed, the Second Circuit's decision will impact thousands, if not millions, of jobs in the financial services industry. If the court of appeals' test continues to govern, for example, anyone whose job "concerns" the production of financial services could be subject to the FLSA's overtime requirements. That rule makes no sense whatsoever—and is flatly at odds with controlling Department of Labor regulations. Worse still, there is no principled way to limit the Second Circuit's decision to the financial services industry.

Such an outcome would have profound, national effects on the affected companies, and would be manifestly inconsistent not only with the intent of Congress in creating the exemption in the first place, but also with the controlling regulations. This case presents the issues cleanly, with pure issues of law—ideal for this Court's resolution of these questions of national import.

I. THE DECISION BELOW CONFLICTS WITH THE GOVERNING DEPARTMENT OF LABOR REGULATIONS AND CREATES A SERIOUS CIRCUIT SPLIT

A. The Second Circuit's Decision Conflicts With The Controlling Department Of Labor Regulations

The decision of the Second Circuit—which will govern the vast majority of our Nation's financial services industry—is irreconcilable with the controlling FLSA standards promulgated by the Department of Labor. With regard to the administrative-production dichotomy, the court of appeals' decision conflicts with those standards in two different ways.

First, the Department of Labor regulations expressly provide that making decisions evaluating credit is work that is exempt. To wit:

> *Another illustration is the credit manager* who makes and administers the credit policy of his employer. *Establishing credit limits* for customers and authorizing the shipment of orders on credit, including the decisions to exceed or otherwise vary these limits in the case of particular customers, *would be exempt work* of the kind specifically described in Sec. 541.2.

29 C.F.R. § 541.208(c) (2003) (emphasis added); see also 29 C.F.R. § 541.703(b)(7) (2009).

The Second Circuit decision conflicts directly with that regulation. And yet, the court of appeals *did*

not even cite that controlling regulation, much less discuss or attempt to reconcile its conclusion with the plain text of the regulation. Instead, it applied the administrative-production dichotomy and concluded that respondent's work evaluating creditworthiness was not exempt, notwithstanding the explicit regulation to the contrary.

Second, the court of appeals' decision directly conflicts with the Department's guidance concerning the appropriate use of the administrative-production dichotomy in classifying workers for FLSA purposes. When the Department revised the regulations in 2004, it stated quite plainly that although it was not "appropriate to eliminate the [production-administrative dichotomy] entirely from the administrative exemption," the Department did not "believe that the dichotomy *has ever been or should be a dispositive test for exemption*." 69 Fed. Reg. 22,122, 22,141 (Apr. 23, 2004) (emphasis added). Rather, it is "but one piece of the larger inquiry," "a relevant and useful tool in appropriate cases" that should be used "*only* to the extent that it clarifies the analysis." *Ibid.* (emphasis added).

But the Second Circuit has done precisely what the Department of Labor—in its considered judgment, after notice-and-comment rulemaking—decided not to do: transform the administrative-production dichotomy into the controlling test for FLSA exemption. And it did so under the aegis of this disfavored, broad generic test, despite a more specific, controlling

regulation expressly governing employees making credit decisions.[2]

B. The Circuits Are Divided Over The Proper Role Of The Administrative-Production Dichotomy In Analyzing The Status Of Workers Under The FLSA

In this case, the Second Circuit erroneously treated as controlling an outdated distinction between production and administrative work that the Seventh and Ninth Circuits have squarely held should not be a dispositive test for exemption. Compare Pet. App. 5 & 13 (stating that under the administrative-production dichotomy, "[e]mployment may * * * be classified as belonging in the administrative category, which falls squarely within the administrative exception, or as production/sales work, which does not" and concluding "that the job of underwriter as it was performed at Chase falls under the category of production rather than of administrative work"), with *Roe-Midgett* v. *CC Servs., Inc.*, 512 F.3d 865, 872-73

[2] Unfortunately, this is not the first time a panel of the Second Circuit has erred in departing from the Department's guidance in interpreting and applying FLSA exemptions. See *Long Island Care at Home*, 551 U.S. at 158, 162 (unanimously reversing the Second Circuit's decision to hold unenforceable certain regulations promulgated by the Department under a statutory exemption that excludes from FLSA coverage "certain subsets of employees 'employed in domestic service employment' ").

(7th Cir. 2008) (holding that the administrative-production dichotomy is "not terribly useful" where job duties involve "obviously neither working on a manufacturing line nor 'producing' anything in the literal sense"); *Bothell* v. *Phase Metrics, Inc.*, 299 F.3d 1120, 1127 (9th Cir. 2002) (holding that the dichotomy "is but one analytical tool, to be used only to the extent it clarifies the analysis" and explaining that "[o]nly when work falls 'squarely on the "production" side of the line'" has the "dichotomy been determinative").

Historically, jobs have been classified as "production" only when they are related directly to an actual production or sale, not when they are collaterally related to it. In sharp contrast to that longstanding view, the court of appeals' decision renders virtually *any* connection to a business' product or service—that is, any task that "concerns" production—as sufficient to classify a job as "production," and thus non-exempt. Compare *Reich* v. *John Alden Life Ins. Co.*, 126 F.3d 1, 9 (1st Cir. 1997) (production jobs "generate (*i.e.*, 'produce') the very product or service that the employer's business offers to the public"), with Pet. App. 12 (question is whether the job at issue "concerns the 'production' of loans—the fundamental service provided by the bank").

Notably, the Department of Labor has expressly endorsed the Ninth Circuit's holding in *Bothell*, a decision with which the Second Circuit's judgment cannot be reconciled. See 69 Fed. Reg. 22,122, 22,141 (Apr. 23, 2004) (explicitly approving the Ninth

Circuit's holding in *Bothell* that the administrative-production dichotomy "has [n]ever been [n]or should be a dispositive test for exemption"); see also *Long Island Care at Home*, 551 U.S. at 165 (explaining that "the FLSA explicitly leaves gaps" and "provides the Department of Labor with the power to fill these gaps through rules and regulations"). As the Ninth Circuit has explained in reasoning diametrically opposed to the Second Circuit's:

> The purpose of the [administrative-production] dichotomy is to clarify the meaning of 'work directly related to the management policies or general business operations,' not to frustrate the purpose and spirit of the entire exemption. If we were to accept Webster's position and view the negotiation of agreements as the bargaining units' production, then any work—including that of a president or CEO—for a legal entity that addresses primarily management or administrative concerns, such as a corporate holding company, would be production. This would defeat the purpose of the administrative exemption.

Webster v. *Pub. Sch. Employees of Washington*, 247 F.3d 910, 915 (9th Cir. 2001); see also *In re Farmers Ins. Exch.*, 481 F.3d 1119, 1132 (9th Cir. 2007) (concluding that applying the administrative-production dichotomy to the duties performed by insurance claims adjustors would "elevate form * * * over substance" and focusing instead on the nature of the work performed by the adjustors that "affect[ed] business operations to a substantial degree"). The Second

Circuit's analysis in this case would similarly "defeat the purpose of the administrative exemption" by rendering virtually all workers non-exempt. See *ibid.*

The Second Circuit's analysis also conflicts with that of the Seventh Circuit in *Roe-Midgett*. In that case, the Seventh Circuit noted that "the so-called production-administrative dichotomy—a concept that has an industrial age genesis—is only useful by analogy in the modern service-industry context." 512 F.3d at 872. The Seventh Circuit went on to conclude that the administrative-production dichotomy was "not terribly useful" in the case before it because the employees there, as here, were "obviously neither working on a manufacturing line nor 'producing' anything in the literal sense." *Id.* at 872-73; see also *Hamby* v. *Associated Ctrs. for Therapy*, No. 06-5043, 230 Fed. Appx. 772, 784, 2007 WL 458011 (10th Cir. 2007) (employee's "job duties cannot be likened to the type of work performed on a manufacturing production line," and his work in providing services to families was "not akin to production or sale of a commodity").

But under the Second Circuit's reasoning, virtually no work described by the regulations or in other court of appeals' opinions would be exempt because every job somehow "concerns" production of the employer's product—otherwise, there would be no need for the job in the first place. Marketing representatives and claims adjusters, for example, arguably perform duties "concerning" the production of their employer's product—but, as the court of appeals

acknowledged, are exempt. See, *e.g.*, Pet. App. 54; *In Re Farmers*, 481 F.3d at 1119 (holding exempt claims adjusters who handled claims as small as $3,000); *John Alden Life Ins. Co.*, 126 F.3d at 1 (same for marketing representatives even though their work was related to the company's production activity). Those decisions cannot be reconciled with the Second Circuit's decision here. As the Ninth Circuit observed in *Webster*, even the CEO's job almost surely concerns the production of the employer's product. The Second Circuit's focus on whether a job "concerns" the production of the employer's product—an unfortunate by-product of its faulty reliance on the administrative-production dichotomy—conflicts with the Department of Labor's regulations. And it makes no sense.

Although the court of appeals appeared to recognize that administrative work "must be performed no matter what the business produces," Pet. App. 14, it failed to recognize that making decisions about which transactions to enter into, as respondent did here, is work that "must be performed no matter what the business produces." Instead—and in conflict with other courts and the Department's regulations—the court of appeals created an artificial distinction between evaluating creditworthiness in the financial services industry, on one hand, and evaluating creditworthiness in every other industry on the other. As the court of appeals put it, "a clothing store accountant deciding whether to issue a credit card to a consumer"—presumably involving a few hundred

dollars—would be exempt, but a financial services employee making a $500,000 decision to approve a loan would not. *Id.* at 14-15. But evaluating creditworthiness to obtain a financial product is no less an administrative task than evaluating creditworthiness to purchase clothes. In both instances, the employee performs an ancillary service to determine whether a customer is worth the risk to sell the product. And, in both instances, whether the employer engages in the sale depends on whether the employee approves the transaction.

The Department's regulations contain numerous examples that are not merely inconsistent with the court of appeals' view that the industry in which the work is being performed should affect whether an employee is exempt, but expressly reject that view: "Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company * * * * *" 29 C.F.R. § 541.203(a) (2009) (emphasis added). Similarly, in the preamble to the 2004 regulations, the Department approvingly cited a case holding that a bank employee who, like respondent, had the "authority to commit employer in matters that have financial impact" was exempt. 69 Fed. Reg. 22,122, 22,143 (Apr. 23, 2004) (citing *Hippen* v. *First Nat'l Bank*, No. 90-2024-L, 1992 WL 73554, at *1 (D. Kan. Mar. 19, 1992)). The Department's favorable citation of *Hippen* demonstrates, contrary to the court of appeals' decision, that employees who make credit decisions in the financial

services industry qualify for the administrative exemption despite the fact that banks exist to lend money.[3]

C. The Circuits Are Divided As To Whether The Payment Of Additional Compensation Can Alter An Employee's Exempt Status Under The FLSA

The Second Circuit's decision also creates a conflict among the circuits concerning whether the payment of additional compensation can alter an employee's exempt status. Contrary to the court of appeals' decision here, the Sixth, Seventh, and Eighth Circuits have squarely held that it does not. See *Acs* v. *Detroit Edison Co.*, 444 F.3d 763, 768 (6th Cir. 2006) (holding that an employer's decision to pay "additional compensation" to an exempt employee does

---

[3] The Department similarly approved a case that expressly distinguished loan originators, whose "primary duty [was] to sell the [the company's] lending products," from "underwriters," like respondent, whose primary duty was to "approve[ ] the loan." 69 Fed. Reg. 22,122, 22,145-46 (Apr. 23, 2004) (discussing *Casas* v. *Conseco Fin. Corp.*, No. 00-1512, 2002 WL 507059, at *1 (D. Minn. Mar. 31, 2002)). In concluding that the loan originators in *Casas* were nonexempt, the Department found significant that the loan originators in *Casas*, unlike respondent, "had no authority to approve loans." *Id.* at 22,146. Yet the court of appeals in the instant case relied upon *Casas* in support of its contrary conclusion that "[a]n employee whose job is to evaluate credit who works in the credit industry is more likely to perform a production job." Pet. App. 17. That notion finds no support in *Casas*, the regulations upon which the panel purported to rely, or the decisions of other circuits.

not render that employee non-exempt); *Kennedy* v. *Commonwealth Edison Co.*, 410 F.3d 365, 370 (7th Cir. 2005) (rejecting argument that because workers were paid "more than their listed salaries, the resulting upward fluctuations must mean that they were hourly workers" and thus non-exempt); *Fife* v. *Harmon*, 171 F.3d 1173, 1175 (8th Cir. 1999) (reversing district court's ruling that the payment of additional compensation was " 'inherently inconsistent' " with being a salaried, exempt worker).

The Second Circuit's decision also conflicts with the Department's regulations, which make clear that additional compensation beyond an employee's salary does not alter an employee's exempt status, 29 C.F.R. § 541.118(b) (2003) ("additional compensation besides the salary is *not* inconsistent with the salary basis of payment" and thus with exempt status) (emphasis added), and with the Department's opinion letters, which reiterate that "[a]dditional compensation * * * does not invalidate an otherwise applicable exemption." See, *e.g.*, DOL Opinion Letter, available at 1997 WL 998013, at *1 (DOL Wage-Hour Mar. 17, 1997).

As a practical matter, the court of appeals' decision (if permitted to stand) will perversely discourage employers from offering premium pay to exempt employees for fear of compromising their exempt status. Nothing in the statute, regulations, or case law requires, much less permits, such a result.

II. THIS CASE INVOLVES RECURRING ISSUES OF NATIONAL IMPORTANCE

The conflicts created by the Second Circuit's decision present recurring issues with profound implications for the Nation's economy as a whole. This Court's intervention is needed now to clarify the applicable standards, dispel the confusion, and restore much-needed predictability in this frequently litigated area of federal law. See, *e.g.*, Ben James, *Wage And Hour Suit Increase Picks Up Steam in '09*, LAW360 (Jan. 10, 2010) (noting nearly 20 percent increase in FLSA suits in 2009 alone).

The Second Circuit's erroneous decision only exacerbates confusion among the lower courts concerning the proper legal framework for analyzing FLSA overtime claims. As courts and commentators have noted, despite the Department's attempt in 2004 to clarify the matter, "it is still not entirely clear just what role the production versus staff dichotomy plays." Shlomo D. Katz & William Schmidt, *Courts and DOL Downplay The "Production Versus Staff" Dichotomy*, FLSA EMPLOYEE EXEMPTION HANDBOOK NEWSLETTER (Oct. 2008); *Harris* v. *Superior Ct. of Los Angeles County*, 64 Cal. Rptr. 3d 547, 561 n.9 (Cal. Ct. App. 2007) (noting that "the federal case law manifests considerable confusion on this issue"); Gibson Dunn & Crutcher, *Second Circuit Issues Wage-Hour "Administrative/Production Dichotomy" Decision Out of Step with Other Circuits* (December 9, 2009) (noting that the Second Circuit's decision "is at odds with the * * * broader trend in the federal appellate

courts to discount the 'administrative-production dichotomy'").

Such persistent confusion can only fuel "the dramatic increase in the use of FLSA class actions," such as the instant case. See Joseph E. Tilson, *et al.*, *Litigating Lawsuits Under The FLSA—The Fastest Growing Area Of Employment Litigation*, 697 PLI/LIT. 649, 657 (Oct.-Nov. 2003). Class and collective actions asserting wage-and-hour claims continue to outpace all other types of employment litigation in federal courts. *Ibid.* Although "[n]o one tracks precise figures," estimates are that "over the last few years companies have collectively paid out more than $1 billion *annually* to resolve these claims, which are usually brought on behalf of large groups of employees." Michael Orey, *Wage Wars*, BUS. WK., Oct. 1, 2007, at 50 (emphasis added). Some commentators have even called the "recent boom of wage and hour litigation * * * one of the most striking developments in modern legal history," with filings in federal court alone "increas[ing] *nearly threefold* since 2000." Daniel C. Lopez, *Collective Confusion: FLSA Collective Actions, Rule 23 Class Actions, and the Rules Enabling Act*, 61 HASTINGS LAW J. 275, 277 (Nov. 2009) (emphasis added). That litigation explosion, in turn, threatens to tax judicial resources and threatens employers with massive and unexpected liabilities. See Evan Spelfogel, *Misclassification: The Profusion, The Cost, and the Remedy*, NYSBA L&E NEWSLETTER, Vol. 34, No. 1, at 7 (Spring 2009) ("Individual, collective and class actions by workers * * *

have accelerated dramatically in recent years with an ever increasing cost to companies both in terms of lost time and legal expense incurred in defending such claims, as well as the concomitant adverse publicity and negative effect on stock prices.").

What is more, the combination of uncertain legal standards, enormous potential damages, and high litigation costs exert tremendous pressure on employers to settle even non-meritorious claims. See Mary Swanton, *Clock Work: Wage and Hour Cases Top Employment Class Actions*, INSIDECOUNSEL (Mar. 1, 2010) ("When employers look at these cases and calculate the potential damages, they resolve the claims because it's expensive to litigate the question of whether the employees are exempt" given the "lack of clarity" and because the requirements for certifying a class are lower than for ERISA or Title VII claims). The lack of clarity with respect to the administrative exemption in particular has serious ramifications for employers because, as one commentator has put it, "[u]ntil you know what the exemption means, how do you manage your business?" *Ibid.* This case presents an ideal opportunity for the Court to resolve the circuit splits and clarify the parameters of the exemption and its proper application, particularly given the enormous pressure on employers to settle even non-meritorious wage-and-hour suits rather than face the costs and uncertainties of trial. See David A. Grant & Tracey L. Allerson, *The Proliferation of FLSA Collective Actions*, LAW360 (June 28, 2007) (explaining that the defense of FLSA collective

actions "can be complex and costly" because "it generally is easier for employees, at least initially, to gain collective action certification" and "[e]xtensive discovery then can ensue before an employer has the opportunity to file a motion for decertification").

In 2008 alone, for example, a single employer settled wage-and-hour cases for more than $700 million. Joseph E. Tilson, *et al.*, *Hot Topics in Wage and Hour Law*, 802 PLI/LIT 681, 685 (Oct. 2009). And over the past five years, wage-and-hour cases involving overtime claims by stockbrokers, financial advisors, and benefits analysts, among others in the financial services industry, have resulted in settlements totaling more than half a billion dollars. *Ibid.* And the litigation continues unabated. See, *e.g.*, *Cohen* v. *Oppenheimer & Co.*, No. 10-cv-00117 (E.D.N.Y. Filed Jan. 12, 2010) (pending overtime claims brought by financial advisors); *Nguyen* v. *BDO Seidman, LLP*, No. SACV 07-1352 JVS (C.D. Cal. Filed Nov. 15, 2007) (same by accounting professionals); *Sexton* v. *Franklin First Fin., Ltd.*, 2:08-cv-04950-JFB-ARL (E.D.N.Y. Filed Dec. 9, 2008) (same by loan officers).

Even if there were not a conflict—and there are two—the Second Circuit's erroneous decision in this case would warrant review given its enormous practical consequences. That is especially true given that so much of our Nation's financial services industry and its employees are located within the boundaries of the Second Circuit. But the ramifications of the Second Circuit's decision are much broader than one industry—indeed, if permitted to stand, the decision

threatens to exacerbate confusion about the administrative exemption used by countless employers to classify millions of employees across a wide swath of industries.

The limited utility of the administrative-production dichotomy in resolving these issues is precisely why the Department and other Circuits have cautioned that the dichotomy should not be treated as controlling but used "only to the extent that it clarifies the analysis." 69 Fed. Reg. 22,122, 22,145 (Apr. 23, 2004); *Roe-Midgett*, 512 F.3d at 872-73; *Bothell*, 299 F.3d at 1127. The Court should therefore grant the petition to correct the Second Circuit's error, dispel the confusion regarding this important and recurring question of federal law, and resolve the conflict among the courts of appeals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD M. RADZELY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
202.739.3000

R. TED CRUZ
Counsel of Record
ALLYSON N. HO
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4000
Houston, Texas 77002
tcruz@morganlewis.com
713.890.5000

CARRIE A. GONELL
MORGAN, LEWIS & BOCKIUS LLP
5 Park Plaza, Suite 1750
Irvine, California 92614
949.399.7000

SAMUEL S. SHAULSON
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, New York 10178
972.423.3131

Counsel for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2009

(Argued: August 3, 2009 Decided: November 20, 2009)

Docket No. 08-4092-cv

MICHAEL J. DAVIS, and all others similarly situated, ELENA LOMBARDO, CAROL SMITH, DANIEL J. MCGRAW,

Plaintiffs,

ANDREW WHALEN,

Plaintiff-Appellant,

– v. –

J.P. MORGAN CHASE & CO.,

Defendant-Appellee.

Before:

POOLER, LIVINGSTON, and LYNCH, *Circuit Judges*.*

Plaintiff employed by J.P. Morgan Chase ("Chase") as an underwriter, challenges Chase's categorization of underwriters as administrative employees exempt

---

* At the time of oral argument, Judge Lynch was a United States District Judge for the Southern District of New York, sitting by designation.

from the Fair Labor Standard Act's overtime pay requirements. *See* 29 U.S.C. § 207(a). Plaintiff now appeals an award of summary judgment entered in the Western District of New York (David G. Larimer, *Judge*) in favor of Chase.

REVERSED.

J. NELSON THOMAS, Dolin, Thomas & Solomon LLP, Rochester, New York, *for Plaintiff-Appellant*.

SAMUEL SHAULSON, Morgan, Lewis & Bockius LLP, New York, New York (Carrie A. Gonnell, Irvine, California, *on the brief*), *for Defendant-Appellee*.

GERARD E. LYNCH, *Circuit Judge*:

This appeal requires us to decide whether underwriters tasked with approving loans, in accordance with detailed guidelines provided by their employer, are administrative employees exempt from the overtime requirements of the Fair Labor Standards Act. Andrew Whalen was employed by J.P. Morgan Chase ("Chase") for four years as an underwriter. As an underwriter, Whalen evaluated whether to issue loans to individual loan applicants by referring to a detailed set of guidelines, known as the Credit Guide, provided to him by Chase. The Credit Guide specified how underwriters should determine loan applicant characteristics such as qualifying income and credit

history, and instructed underwriters to compare such data with criteria, also set out in the Credit Guide, prescribing what qualified a loan applicant for a particular loan product. Chase also provided supplemental guidelines and product guidelines with information specific to individual loan products. An underwriter was expected to evaluate each loan application under the Credit Guide and approve the loan if it met the Guide's standards. If a loan did not meet the Guide's standards, certain underwriters had some ability to make exceptions or variances to implement appropriate compensating factors. Whalen and Chase provide different accounts of how often underwriters made such exceptions.

Under the Fair Labor Standards Act (FLSA), employers must pay employees overtime compensation for time worked in excess of forty hours per week. *See* 29 U.S.C. § 207(a). Whalen claims that he frequently worked over forty hours per week. A number of categories of employees are exempted from the overtime pay requirement. The exemptions are drawn along a number of lines demarcating the type of profession, job function, and other characteristics. One categorical exemption is for employees who work in a "bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1).[1]

---

[1] Chase does not contend that Whalen engaged in "executive" or "professional" work, or fell within any other exception to the maximum hours provision of the FLSA.

At the time of Whalen's employment by Chase, Chase treated underwriters as exempt from the FLSA's overtime requirements. Whalen sought a declaratory judgment that Chase violated the FLSA by treating him as exempt and failing to pay him overtime compensation. Both Whalen and Chase filed motions for summary judgment. The district court denied Whalen's motions and granted Chase's motion, dismissing Whalen's complaint. This appeal followed.

We review the district court's ruling on a motion for summary judgment de novo, construing the evidence in favor of the non-moving party. *See Krauss v. Oxford Health Plans, Inc.*, 517 F.3d 614, 621-22 (2d Cir. 2008); *Petrosino v. Bell Atl.*, 385 F.3d 210, 219 (2d Cir. 2004). We may affirm the district court's grant of summary judgment on any ground upon which the district court could have relied. *See Santos v. Murdock*, 243 F.3d 681, 683 (2d Cir. 2001). Exemptions from the FLSA's requirements "are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S. Ct. 453, 4 L. Ed. 2d 393 (1960).

The statute specifying that employees who work in "bona fide executive, administrative, or professional capacit[ies]" are exempt from the FLSA overtime pay requirements does not define "administrative." 29 U.S.C. § 213(a)(1). Federal regulations specify, however, that a worker is employed in a bona fide administrative capacity if she performs work "directly

related to management policies or general business operations" and "customarily and regularly exercises discretion and independent judgment." 29 C.F.R. § 541.2(a).[2] Regulations further explain that work directly related to management policies or general business operations consists of "those types of activities relating to the administrative operations of a business as distinguished from 'production' or, in a retail or service establishment, 'sales' work." 29 C.F.R. § 541.205(a).[3] Employment may thus be classified as belonging in the administrative category, which falls squarely within the administrative exception, or as production/sales work, which does not.

Precedent in this circuit is light but provides the framework of our analysis to identify Whalen's job as either administrative or production. In *Reich v. State of New York*, 3 F.3d 581 (2d Cir. 1993), *overruled by implication on other grounds by Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996), we held that members of the state police assigned to the Bureau of Criminal Investigation (BCI), known as BCI Investigators, were not exempt as administrative employees. *See id.* at 585, 588. BCI

---

[2] The Department of Labor issued new regulations defining the administrative exemption in 2004. Unless otherwise specified, reference to the regulations is to the pre-2004 regulations.

[3] Although there are other requirements to fall within the exemption, such as customarily and regularly exercising discretion, because we conclude that Whalen's work was not "administrative," we need not decide whether Whalen's employment as an underwriter met those requirements.

Investigators are responsible for supervising investigations performed by state troopers and conducting their own investigations of felonies and major misdemeanors. Applying the administrative versus production analysis, we then reasoned that because "the primary function of the Investigators . . . is to conduct —or 'produce'—its criminal investigations," the BCI Investigators fell "squarely on the 'production' side of the line" and were not exempt from the FLSA's overtime requirements. *Id.* at 587-88.

The administrative/production dichotomy was similarly employed in a Vermont case we affirmed last year, but the circumstances of our affirmance limit its precedential value. The facts of that case were similar to those presented here: the plaintiffs were employed as underwriters for a company in the business of underwriting mortgage loans that were then sold to the secondary lending market. *See Havey v. Homebound Mortgage, Inc.*, No. 2:03-CV-313, 2005 WL 1719061, at *1 (D. Vt. July 21, 2005), *aff'd*, 547 F.3d 158 (2d Cir. 2008). The district court concluded with very little analysis that the underwriters were not employed in production because they performed "nonmanual work related to Homebound's business." *Id.* at *5. Significantly, the court appeared to assume that "production" must relate to tangible goods, citing a Connecticut case in which the court refused to grant summary judgment finding that material planning specialists, senior financial analysts, project financial analysts, and logistics specialists employed by a company that built submarines were exempt from

FLSA's overtime requirements. *See id.* at *5 n.6, *citing Cooke v. Gen. Dynamics Corp.*, 993 F. Supp. 56 (D. Conn. 1997). The *Havey* court noted that "[i]n that case . . . the corporation was in the business of producing submarines. Homebound was in the business of underwriting mortgage loans. No production was taking place." *Id.* (citations omitted).

As *Reich* illustrates, this literal reading of "production" to require tangible goods has no basis in law or regulation. We affirmed the district court in *Havey*, but the only issue presented on appeal was whether plaintiffs were paid on a salary basis under the payment structure adopted by Homebound. Accordingly, our opinion offered no analysis as to whether the underwriters performed work directly related to the management policies or general business operations of their employers under the FLSA. We therefore do not read our *Havey* opinion as adopting the flawed analysis of the Vermont court as to administrative and production job functions.

The line between administrative and production jobs is not a clear one, particularly given that the item being produced—such as "criminal investigations"—is often an intangible service rather than a material good. Notably, the border between administrative and production work does not track the level of responsibility, importance, or skill needed to

perform a particular job.[4] The monetary value of the loans approved by Whalen as an underwriter, for example, is irrelevant to this classification: a bank teller might deal with hundreds of thousands of dollars each month whereas a staffer in human resources never touches a dime of the bank's money, yet the bank teller is in production and the human resources staffer performs an administrative position. Similarly, it is irrelevant that Whalen's salary was relatively low or that he worked in a cubicle. What determines whether an underwriter performed production or administrative functions is the nature of her duties, not the physical conditions of her employment.

The Department of Labor has attempted to clarify the classification of jobs within the financial industry through regulations and opinion letters. In 2004, the Department of Labor promulgated new regulations discussing, among other things, employees in the financial services industry. Although these regulations were instituted after Whalen's employment with Chase ended, the Department of Labor noted that the new regulations were "[c]onsistent

---

[4] Such considerations may be relevant to other, independent, requirements for exemption from the FLSA overtime provisions. The responsibility exercised by an employee, for example, would affect whether that employee "customarily and regularly exercise[d] discretion and independent judgment." 29 C.F.R. § 541.2. Such a determination, however, is entirely separate from whether an employee's function may be classified as administrative or production-related.

with existing case law." 69 Fed. Reg. 22,122, 22,145 (Apr. 23, 2004). The regulation states:

> Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

29 C.F.R. § 541.203(b).

The Department of Labor explained that the new regulation was sparked by growing litigation in the area and contrasted two threads of case law. On the one hand, some courts found that "employees who represent the employer with the public, negotiate on behalf of the company, and engage in sales promotion" were exempt from overtime requirements. 69 Fed. Reg. 22,122, 22,145 (Apr. 23, 2004), *citing Hogan v. Allstate Ins. Co.*, No. 02-15918, 2004 WL 362378 (11th Cir. 2004); *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1 (1st Cir. 1997); *Wilshin v. Allstate Ins. Co.*, 212 F. Supp. 2d 1360 (M.D. Ga. 2002). On the other hand, the Department cited a Minnesota district court, which found that "employees who had a

'primary duty to sell [the company's] lending products on a day-to-day basis' directly to consumers" were not exempt. 69 Fed. Reg. 22,122, 22,145 (Apr. 23, 2004), *quoting Casas v. Conseco Fin. Corp.*, No. Civ. 00-1512(JRT/SRN), 2002 WL 507059, at *9 (D. Minn. 2002). The regulation thus helped to clarify the distinction between employees performing substantial and independent financial work and employees who merely sold financial products.

Opinion letters issued by the Department of Labor similarly recognize a variance in the types of work performed by employees within the financial industry, and explain why some financial employees are administrative while some perform production functions. In 2001, the Department stated that a loan officer who was responsible for creating a loan package to meet the goals of a borrower by "select[ing] from a wide range of loan packages in order to properly advise the client, . . . supervis[ing] the processing of the transaction to closing," and "acquir[ing] a full understanding of the customer's credit history and financial goals in order to advise them regarding the selection of a loan package that will fit their needs and ability" performed administrative work, although the opinion letter ultimately concluded that such loan officers were not exempt. Dep't of Labor, Wage & Hour Div., Op. Letter (Feb. 16, 2001), *available at* 2001 WL 1558764.

Crucially, the 2001 opinion letter clarified an opinion letter issued in 1999 after the Department received more information about the loan officer's

duties. In 1999, the Department understood loan officers to develop new business for their employer, consult with borrowers to obtain the best possible loan package, work with a number of different lenders to select loan programs, and perform assorted services shepherding the loan to completion. *See* Dep't of Labor, Wage & Hour Div., Op. Letter (May 17, 1999), *available at* 1999 WL 1002401. With that understanding of the loan officers' duties, the Department concluded that the loan officers were "engaged in carrying out the employer's day-to-day activities rather than in determining the overall course and policies of the business" and were therefore not employed as administrative employees. *See id.* While the 2001 letter reconsidered the loan officers' employment and reached a different conclusion, the later letter noted that the reconsideration was "in light of the advisory duties [loan officers] perform on behalf of their employer's customers," which the employer clarified were the "primary duty" of a loan officer. *See* 2001 WL 1558764. The two letters read together thus provide a helpful point of reference, highlighting the importance of advisory duties as opposed to mere loan sales.

We thus turn to the job of underwriter at Chase to assess whether Whalen performed day-to-day sales activities or more substantial advisory duties. As an underwriter, Whalen's primary duty was to sell loan products under the detailed directions of the Credit Guide. There is no indication that underwriters were expected to advise customers as to what loan

products best met their needs and abilities. Underwriters were given a loan application and followed procedures specified in the Credit Guide in order to produce a yes or no decision. Their work is not related either to setting "management policies" nor to "general business operations" such as human relations or advertising, 29 C.F.R. § 541.2, but rather concerns the "production" of loans—the fundamental service provided by the bank.

Chase itself provided several indications that they understood underwriters to be engaged in production work. Chase employees referred to the work performed by underwriters as "production work." Within Chase, departments were at least informally categorized as "operations" or "production," with underwriters encompassed by the production label. Underwriters were evaluated not by whether loans they approved were paid back, but by measuring each underwriter's productivity in terms of "average of total actions per day" and by assessing whether the underwriters' decisions met the Chase credit guide standards.

Underwriters were occasionally paid incentives to increase production, based on factors such as the number of decisions underwriters made. While being able to quantify a worker's productivity in literal numbers of items produced is not a requirement of being engaged in production work, it illustrates the concerns that motivated the FLSA. The overtime requirements of the FLSA were meant to apply financial pressure to "spread employment to avoid the

extra wage" and to assure workers "additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act." *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572, 577-78, 62 S. Ct. 1216, 86 L. Ed. 1682 (1942), *superseded by statute*, Portal-to-Portal Pay Act of 1947, ch. 52, 61 Stat. 84 (granting courts authority to deny or limit liquidated damages awarded for violations of the FLSA). While in the abstract any work can be spread, there is a relatively direct correlation between hours worked and materials produced in the case of a production worker that does not exist as to administrative employees. Paying production incentives to underwriters shows that Chase believed that the work of underwriters could be quantified in a way that the work of administrative employees generally cannot.

We conclude that the job of underwriter as it was performed at Chase falls under the category of production rather than of administrative work. Underwriters at Chase performed work that was primarily functional rather than conceptual. They were not at the heart of the company's business operations. They had no involvement in determining the future strategy or direction of the business, nor did they perform any other function that in any way related to the business's overall efficiency or mode of operation. It is undisputed that the underwriters played no role in the establishment of Chase's credit policy. Rather, they were trained only to apply the credit policy as they found it, as it was articulated to them through the detailed Credit Guide.

Furthermore, we have drawn an important distinction between employees directly producing the good or service that is the primary output of a business and employees performing general administrative work applicable to the running of any business. In *Reich*, for example, BCI Investigators "produced" law enforcement investigations. By contrast, administrative functions such as management of employees through a human resources department or supervising a business's internal financial activities through the accounting department are functions that must be performed no matter what the business produces. For this reason, the fact that Whalen assessed creditworthiness is not enough to determine whether his job was administrative. The context of a job function matters: a clothing store accountant deciding whether to issue a credit card to a consumer performs a support function auxiliary to the department store's primary function of selling clothes. An underwriter for Chase, by contrast, is directly engaged in creating the "goods"—loans and other financial services—produced and sold by Chase.

This conclusion is also supported by persuasive decisions of our sister circuits. In *Bratt v. County of Los Angeles*, the Ninth Circuit held that the "essence" of an administrative job is that an administrative employee participates in "the running of a business, and not merely . . . the day-to-day carrying out of its affairs." 912 F.2d 1066, 1070 (9th Cir. 1990) (internal quotations omitted). The Department of Labor later quoted that same language approvingly. *See* Dep't of

Labor, Wage & Hour Div., Op. Letter (Sept. 12, 1997), *available at* 1997 WL 971811. More recently, the Ninth Circuit expanded, "The administration/production distinction thus distinguishes between work related to the goods and services which constitute the business' marketplace offerings and work which contributes to 'running the business itself.'" *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1127 (9th Cir. 2002). The Third Circuit has also noted that production encompasses more than the manufacture of tangible goods. *See Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 903-04 (3d Cir. 1991). In that case, telephone salespersons were given a pricing matrix specifying price quotes for specific goods as offered to specific customers. The salespersons had some authority to deviate from the price quotes, and occasionally also called manufacturers to restock items, negotiating the price of acquiring the item with the manufacturer. The salespersons were paid a fixed salary, but were also paid incentives tied to their sales performance. The Third Circuit held that the salespersons were production employees because the goal of the salespersons was "to *produce* wholesale sales." *Id.* at 903 (emphasis in original). Along similar lines, the First Circuit held that marketing representatives charged with cultivating and supervising an independent sales force were exempt administrative employees, as their primary duties of educating and organizing salespeople were "aimed at promoting . . . customer sales *generally*," not "routine selling efforts focused simply on particular sales

transactions." *Reich v. John Alden Life Ins. Co.*, 126 F.3d at 10 (emphasis in original).

A number of district court opinions have drawn a similar distinction. *See, e.g., Neary v. Metro. Prop. & Cas. Ins. Co.*, 517 F. Supp. 2d 606, 614 (D. Conn. 2007) (finding that a claims adjuster did not perform administrative work because he did not perform "duties clearly related to servicing the business itself: it could not function properly without employees to maintain it; a business must pay its taxes and keep up its insurance. Such are not activities that involve what the day-to-day business specifically sells or provides, rather these are tasks that every business must undertake in order to function."); *Relyea v. Carman, Callahan & Ingham, LLP*, No. 03 Civ. 5580(DRH)(MLO), 2006 WL 2577829, at *5 (E.D.N.Y. 2006) ("Like [escrow] closers . . . , Plaintiffs applied existing policies and procedures on a case-by-case basis. Their duties do not involve the crafting of those policies, but rather the application of those policies. As a result, Plaintiffs are better described as 'production,' rather than 'administrative' workers, and they are not exempt from FLSA."); *Casas*, 2002 WL 507059, at *9 (finding that loan originators for a finance company who were "responsible for soliciting, selling and processing loans as well as identifying, modifying and structuring the loan to fit a customer's financial needs" were "primarily involved with 'the day-to-day carrying out of the business' rather than 'the running of [the] business [itself]' or determining its overall course or policies" (quoting *Bratt*, 912 F.2d

at 1070)); *Reich v. Chi. Title Ins. Co.*, 853 F. Supp. 1325, 1330 (D. Kan. 1994) (finding escrow closers employed by a company engaged in the business of insuring title for real property to be engaged in a production rather than administrative capacity).

Other out-of-circuit cases similarly support the logic that context matters. An employee whose job is to evaluate credit who works in the credit industry is more likely to perform a production job. *See Casas*, 2002 WL 507059, at *9 (loan officers for bank are production); *Relyea*, 2006 WL 2577829, at *5 (loan closers are production); *Reich v. Chi. Title Ins. Co.*, 853 F. Supp. at 1330. Employees who evaluate and extend credit on behalf of a company that is not in the credit industry—extending credit in order to allow customers to purchase a tangible good that the employer manufactured, for example—are generally considered administrative employees. *See Hills v. W. Paper Co.*, 825 F. Supp. 936 (D. Kan. 1993) (employee extended credit to customers of company manufacturing paper); *Reich v. Haemonetics*, 907 F. Supp. 512 (D. Mass. 1995) (employee involved in extending credit to customers of company that sold equipment to hospitals). But in the context of such businesses, such employees provide adjunct, general services to the overall running of the business, while at Chase, underwriters such as Whalen are the workers who produce the services—loans—that are "sold" by the business to produce its income.

Chase offers a few out of circuit cases suggesting that underwriters are exempt administrative

employees, but the cases are distinguishable on their facts. *See, e.g., Edwards v. Audubon Ins. Group Co.*, No. 3:02-CV-1618-WS, 2004 WL 3119911, at *5 (S.D. Miss. Aug. 31, 2004) (finding an underwriter who "decide[d] what risks the company would take and at what price" an exempt administrative employee); *Callahan v. Bancorpsouth Ins. Servs. of Miss., Inc.*, 244 F. Supp. 2d 678, 685-86 (S.D. Miss. 2002) (finding manager responsible for overseeing all aspects of employer's operations, including marketing, billing and collections, and underwriting, was administrative employee); *Hippen v. First Nat'l Bank*, Civ. A. No. 90-2024-L, 1992 WL 73554, at *7 (D. Kan. Mar. 19, 1992) (finding executive vice president of bank who described himself as "number two" in hierarchy and was member of board of directors to be administrative employee); *Creese v. Wash. Mut. Bank*, No. B193931, 2008 WL 650766, at *8 (Cal. Ct. App. 2008) (noting specifically that lower court determination as to class certification did not address the merits of whether underwriters seeking to challenge exempt classification were administrative employees). In virtually all of these cases, the employee in question exercised managerial tasks beyond assessing credit risk, or assessed risks in a firm whose primary business was not the extension of credit, and the result is therefore not in tension with the analysis offered here. In any event, to the extent that the reasoning, language, or result in any of these cases is not consistent with our analysis, we respectfully disagree.

Accordingly, we hold that Whalen did not perform work directly related to management policies or general business operations. Because an administrative employee must *both* perform work directly related to management policies or general business operations *and* customarily and regularly exercise discretion and independent judgment, we thus hold that Whalen was not employed in a bona fide administrative capacity. We need not address whether Whalen customarily and regularly exercised discretion and independent judgment.

The judgment of the district court in favor of the appellee is REVERSED.

569 F. Supp. 2d 327

Andrew WHALEN, Plaintiff,

v.

J.P. MORGAN CHASE & CO., Defendant.

No. 01-CV-6492L.

United States District Court,
W.D. New York.

Aug. 6, 2008.

J. Nelson Thomas, Michael J. Lingle, Dolin, Thomas & Solomon LLP, Rochester, NY, for Plaintiff.

Carrie Anne Gonell, Samuel Estreicher, Samuel S. Shaulson, Morgan, Lewis & Bockius LLP, Todd A. Gutfleisch, J.P. Morgan Chase & Co., New York, NY, for Defendant.

DECISION AND ORDER

DAVID G. LARIMER, District Judge.

Plaintiff, Andrew Whalen ("Whalen"), a former employee of defendant JP Morgan Chase Bank ("Chase"), alleges that Chase failed to pay him, and a class of similarly-situated underwriters, overtime compensation in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., and New York Labor Law § 190 et seq. and § 650 et seq.[1]

---

[1] This action was originally commenced by Michael Davis. Whalen and three other party-plaintiffs subsequently joined the

(Continued on following page)

Chase's claims that Whalen was not entitled to overtime because he was an exempt, administrative employee under the regulations adopted by the Department of Labor, 29 C.F.R. § 541.500 et seq.

Whalen has moved for summary judgment on the grounds that he is a bona fide administrative employee entitled to overtime (Dkt. # 72), and Chase has cross-moved for summary judgment on the grounds that Whalen is not an administrative employee (Dkt. # 90). For the reasons that follow, plaintiff's motion is denied, Chase's motion is granted, and the Complaint is dismissed.

DISCUSSION

A. Standard of Review on a Motion for Summary Judgment

It is well settled that a motion for summary judgment should be granted only where there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. Proc. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). When ruling on a motion for summary judgment, the court must construe the alleged facts

---

litigation. Pursuant to a Stipulation dated December 4, 2002 (Dkt. # 31), it is now being litigated as an individual case.

in the light most favorable to the nonmovant. *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962). A party who bears the burden of proof on a particular claim must factually support each element of his or her claim. "[A] complete failure of proof concerning an essential element . . . necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323, 106 S. Ct. 2548. Thus, on those issues on which the nonmoving party bears the ultimate burden of proof, it is his or her responsibility to confront the motion for summary judgment with evidence in admissible form. *Anderson*, 477 U.S. at 256, 106 S. Ct. 2505.

B. Facts

Chase is a global financial services firm that offers a number of financial products and services, including home equity lines of credit, home equity loans and various kinds of mortgages. Whalen was employed by Chase as an underwriter (also called a credit analyst) in Chase's Home Equity group in Rochester, New York from November 1998 until May 2002.

As an underwriter, Whalen's primary job duty was to evaluate the creditworthiness of Chase's customers applying for loans and lines of credit, and decide whether to approve such requests. In making credit decisions, Whalen analyzed documents concerning applicants' finances and credit histories, and made determinations, pursuant to certain written

Chase policies and guidelines (the "Credit Policy"), as to whether the collateral was sufficient to offset the financial risk to Chase. In some instances, Whalen was authorized to approve loan requests and/or make counteroffers on loan requests with one or more variances or exceptions to Chase's policies and guidelines.

C. Claims Under the FLSA

The FLSA requires compensation at one and a half times the regular rate when an employer requires the employee to work more than forty hours per week. *See* 29 U.S.C. § 207(a)(2). To establish an FLSA claim, plaintiff must prove that: (1) he was an employee who was eligible for overtime (i.e., that he was not exempt from the Act's overtime pay requirements); and (2) that he actually worked overtime hours for which he was not compensated. *See id.*; *Barry v. Town of Elma*, 2005 WL 711842 at *2, 2005 U.S. Dist. LEXIS 5548, at *5-*6 (W.D.N.Y. 2005).[2] Because the FLSA is a remedial act, its exemptions are narrowly construed. *See Martin v. Malcolm*

---

[2] The relevant portions of New York Labor Law do not diverge from the requirements of the FLSA: hence, although the Court's analysis makes specific reference to federal law, it applies equally to Falleson's state law claims. *See Bennett v. Progressive Corp.*, 225 F. Supp. 2d 190, 215 (N.D.N.Y. 2002); *Bandhan v. Lab. Corp. of America*, 234 F. Supp. 2d 313, 316 n. 2 (S.D.N.Y. 2002). *See generally Brown v. Tomcat Electrical Security, Inc.*, 2007 WL 2461823 at *6-7, 2007 U.S. Dist. LEXIS 63542 at *19 (E.D.N.Y. 2007).

Pirnie, Inc., 949 F.2d 611, 614 (2d Cir. 1991); *Burke v. County of Monroe*, 225 F. Supp. 2d 306, 317 (W.D.N.Y. 2002). The employer bears the burden of proving that an employee is exempt, by demonstrating that the employee serves in a bona fide executive, administrative, or professional capacity. *Id.*; 29 U.S.C. § 214(a)(1).

Here, defendant claims that plaintiff is exempt as an administrative employee. Whether an employee's duties are "administrative" within the meaning of the FLSA is a question of law. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714, 106 S. Ct. 1527, 89 L. Ed. 2d 739 (1986).

The Department of Labor's ("DOL") regulations set forth a "short test" to determine an employee's exempt status. In addition to other exemptions, the regulations exempt from the FLSA any employee who is "employed in a bona fide administrative capacity": that is, whose weekly wage exceeds the applicable statutory threshold, whose primary duty is office or non-manual work directly related to management policies or general business operations of the employer, and which involves the exercise of discretion and independent judgment. 29 U.S.C. § 201 et seq.; 29 C.F.R. § 541.200(a).[3]

---

[3] It is undisputed that the 2003 regulations control, and the parties have cited to the regulations as they were numbered in 2003. To ensure clarity, the Court has opted to employ the present-day regulations, which include some changes to

(Continued on following page)

It is undisputed that plaintiff's wages satisfy the statutory threshold. Accordingly, whether he was "employed in a bona fide administrative capacity" turns upon whether he performed administrative duties, and exercised discretion and independent judgment.

1. Administrative Duties

At the outset, I note that the DOL's Interpretive Regulations specifically address the rendering of credit decisions, classifying it as exempt, administrative work:

> A credit manager who makes and administers the credit policy of his employer, establishes credit limits for customers, authorizes the shipment of orders on credit, and makes decisions on whether to exceed credit limits would be performing work exempt under § 541.200. Work that is directly and closely related to these exempt duties may include checking the status of accounts to determine whether the credit limit would be exceeded by the shipment of a new order, removing credit reports from the files for analysis, and writing letters giving

---

numbering and sentence structure, but to which no relevant substantive changes have been made.

> credit data and experience to other employers or credit agencies.

29 C.F.R. § 541.703(b)(7).[4]

Moreover, the DOL has stated that with respect to administrative work in the financial services sector, "[e]mployees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts . . . " 29 C.F.R. § 541.203(b).

Here, it is undisputed that plaintiff's duties, and those of other Chase underwriters, included the review of customer financial information concerning requests for loans and lines of credit, including the gathering of any additional required information, and the making of a decision—binding upon Chase—to approve or deny the loan request. As such, plaintiff's primary duty was to evaluate and determine the credit-worthiness of Chase customers, analyzing

---

[4] The Secretary's legislative regulations interpreting FLSA exemptions are entitled to controlling weight unless they are found to be arbitrary, capricious, or manifestly contrary to the statute. *See Freeman v. National Broadcasting Co.*, 80 F.3d 78, 82 (2d Cir. 1996). In addition to legislative regulations, the Secretary has also promulgated interpretive regulations, which although not binding, "are entitled to considerable weight because they constitute a body of experience and informed judgment to which courts may properly resort for guidance." *Burke*, 225 F. Supp. 2d at 317.

putative borrowers' financial information in light of Chase's Credit Policy. Plaintiff was, however, empowered to grant variances and exceptions to borrowers who would not otherwise qualify for credit under the Credit Policy, where he determined that a denial of credit would not serve Chase's best interest.

By performing these duties, plaintiff represented Chase's financial interests with respect to those of its clients whom he serviced. Although plaintiff strains to characterize plaintiff's role as one of mere production, "helping to generate credit product after credit product for each customer," it is undisputed that plaintiff was not responsible for developing or "selling" Chase's loan or home equity products to its customers. The crux of plaintiff's duties was the analysis and rendering of individualized decisions which committed Chase to certain financial obligations, not the slavish manufacture of "credit products" on some theoretical assembly line.

I find that plaintiff's duties, which primarily include "collecting and analyzing information regarding the customer's income, assets, investments or debts," making "decisions to exceed or otherwise vary these limits in the case of particular customers," and otherwise upholding Chase's Credit Policy, are clearly "office, non-manual work directly related to management policies or general business operations of the employer," and therefore administrative. 29 C.F.R. §§ 541.200, 203(b). Indeed, all other courts known to have examined the issue have unanimously concluded that underwriting is an administrative

function. *See e.g., Havey v. Homebound Mortgage, Inc.*, 2005 WL 1719061, 2005 U.S. Dist. LEXIS 27036 (D. Vt. 2005); *Edwards v. Audubon Ins. Group, Inc.*, 2004 WL 3119911, 2004 U.S. Dist. LEXIS 27562 (S.D. Miss. 2004); *Callahan v. Bancorpsouth Ins. Servs.*, 244 F. Supp. 2d 678, 687 (S.D. Miss. 2002); *Creese v. Washington Mutual Bank*, 2008 WL 650766, 2008 Cal.App. Unpub. LEXIS 2060 (Cal. Ct. App. 2008) (unpublished order).

2. Exercise of Discretion and Independent Judgment

The final element of the administrative exemption test requires that plaintiff's position include the exercise of discretion and independent judgment. The DOL has specified:

> In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term . . . implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision, and with respect to matters of significance . . . The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising

> discretion and independent judgment within the meaning of the regulations.

29 C.F.R. § 541.202(a), (c).

Plaintiff's authority to bind Chase to extend loans and lines of credit up to $500,000.00 each manifestly relates to "matters of significance" for Chase's business. It is undisputed that plaintiff's decisions over the course of three-plus years involved over two-and-a-half billion dollars in loans, and thus over two-and-a-half billion dollars of potential risk, for Chase. In making those decisions, which were final and binding upon Chase, plaintiff used his independent judgment to assess loan files and evaluate the reasons offered by customers for any discrepancies or "derogatory credit items." Plaintiff had the discretion to require a customer to submit additional information, or else waive the customer's obligation to provide required information. Most significantly, plaintiff exercised the discretion and independent judgment to make the ultimate decision as to whether Chase should extend credit to a customer, including whether variances and/or exceptions to Chase's policies and guidelines should be extended, whether a counteroffer should be made and under what terms, and what disposition should be recommended to supervisors when forwarding files outside of his lending authority.

While plaintiff appropriately emphasizes that such decisions were made, and required to be made, consistent with Chase's Credit Policy, adherence to

instructions does not, by itself, prevent the exercise of discretion and independent judgment within the meaning of the applicable regulations. *See e.g.*, 29 C.F.R. § 541.704; *Donovan v. Burger King Corp.*, 675 F.2d 516, 521-22 (2d Cir. 1982) (a corporation's issuance of detailed guidelines to employees does not prevent the exercise of discretion and independent judgment, where corporate success is as dependent upon discretion "as adherence to 'the book'"). While it is undisputed that the Credit Policy provided guidelines for the calculation of credit risk scores which influenced the outcome of plaintiff's decision-making to varying degrees, it was not always dispositive, and plaintiff and other witnesses testified via depositions and affidavits that the policy contained gray areas within which underwriters were expected to exercise their own judgment, and that reasonable underwriters applying the Credit Policy could reach different decisions when reviewing the same file. *See e.g.*, Parmar Aff., dated May 17, 2007, at 4; Whalen Dep. 43; Lopa Dep. 72-73; Smith Dep. 15, 92-93; McGraw Dep. 135.[5] In fact, the Credit Policy itself instructs underwriters to make "an

---

[5] The instant motions have been filed under seal. Due to an ongoing dispute between the parties as to what portions of their submissions should be sealed and/or redacted, Chase's reply to plaintiff's motion for summary judgment has not yet been filed and made part of the public record. There appears to be no dispute that plaintiff was duly served with Chase's reply, and as set forth below, the Court will order the filing and unsealing of the parties' submissions, as appropriate, forthwith.

informed decision which has been based on an appropriate level of analytical review and the use of a considered objective judgment . . . [t]here will always be situations that fall into gray areas with respect to the underwriting of a final decision on a file . . . credit risk analysis is perceived as an art; not as a science . . . [T]he underwriter must recognize that it is his/her responsibility to use sound judgment and to seek advice/expertise, when necessary, in making lending decisions." (Shaulson Reply Aff., dated May 17, 2007, Exh. O at § 2.5.4, 2.8).

Based on the foregoing, I find that plaintiff's duties included "the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered," and therefore involved the exercise of discretion and independent judgment sufficient to render them exempt. 29 C.F.R. § 541.202(a).

3. Plaintiff's Status During His Training Period

Plaintiff argues that even if plaintiff's duties as an underwriter render him exempt, plaintiff was not exempt with respect to work performed during his initial "training period," because plaintiff did not yet have lending authority, and was empowered only to make recommendations concerning the disposition of loan applications, including whether variances or exceptions should be made. However, the DOL Regulations specify that "[t]he decisions made as a

result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action." 29 C.F.R. § 541.202(c). It is undisputed that the plaintiff's duty to exercise discretion and independent judgment as an underwriter was required in equal measure during his training period, regardless of whether he had attained full authority to make decisions that were binding on Chase. As such, I conclude that plaintiff was exempt during that time, as well.

I have examined and considered the remainder of plaintiff's arguments, and find them to be without merit.

CONCLUSION

For the foregoing reasons, plaintiff's motion for summary judgment (Dkt. # 72) is denied, defendant's cross motion for summary judgment (Dkt. # 90) is granted, and the Complaint is dismissed, with prejudice.

As noted above, submissions in the instant motions were filed either under seal, or in some cases, not filed at all, due to disputes between the parties concerning the extent to which they included confidential information. It is well settled that "documents used by parties moving for, or opposing, summary judgment should not remain under seal absent the most compelling reasons." *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982). As such, within ten (10) days from the entry of this Decision and Order: (1) Chase is

ordered to file any and all documents which it submitted to the Court concerning the instant motions which have not been previously filed, and may do so under seal only to the extent that Chase intends to request the continued sealing of portions thereof; and (2) any party that seeks the continued sealing and/or redaction of any document filed under seal shall notify the Court in writing of those documents or portions of documents for which continued sealing is requested, as well as the "compelling reasons" therefor. Counsel shall then immediately submit to the Court a joint consent Order unsealing any document or portion of a document for which continued sealing has not been requested, and the Court will determine whether sufficient legal justification has been provided for the continued sealing of any document or portion of a document.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 22nd day of January, two thousand ten.

Michael J. Davis, and all others similarly situated, Elena Lombardo, Carol Smith, Daniel J. McGraw,

Plaintiffs,

Andrew Whalen,

Plaintiff-Appellant,

v.

J.P. Morgan Chase & Co.,

Defendant-Appellee.

08-4092-cv

(Filed Jan. 22, 2010)

J.P. Morgan Chase & Co. having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

29 U.S.C. § 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

---

29 U.S.C. § 213. Exemptions

(a) Minimum wage and maximum hour requirements

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are

defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities)

* * *

29 C.F.R. § 541.2 (2003) Administrative.

The term *employee employed in a bona fide* * * * *administrative* * * * *capacity* in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of either:

(1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c)(1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week ($130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed: *Provided*, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week ($200 per week if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

---

29 C.F.R. § 541.103 (2003) Primary duty.

A determination of whether an employee has management as his primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time. Thus, an employee who spends over 50 percent of his time in management would have management as his primary duty. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor. For example, in some departments, or subdivisions of an establishment, an employee has broad responsibilities similar to those of the owner or manager of the establishment, but generally spends more than 50 percent of his time in production or sales work. While engaged in such work he supervises other employees, directs the work of warehouse and delivery men,

approves advertising, orders merchandise, handles customer complaints, authorizes payment of bills, or performs other management duties as the day-to-day operations require. He will be considered to have management as his primary duty. In the data processing field an employee who directs the day-to-day activities of a single group of programers and who performs the more complex or responsible jobs in programing will be considered to have management as his primary duty.

---

29 C.F.R. § 541.118 (2003) Salary basis.

(b) *Minimum guarantee plus extras.* It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $155 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount

specified in the regulations in any week in which the employee performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $200 in each week in which any work is performed, and an additional $50 which is made subject to deductions which, are not permitted under paragraph (a) of this section.

---

29 C.F.R. § 541.205 (2003) Directly related to management policies or general business operations.

(a) The phrase "directly related to management policies or general business operations of his employer or his employer's customers" describes those types of activities relating to the administrative operations of a business as distinguished from "production" or, in a retail or service establishment, "sales" work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers.

(b) The administrative operations of the business include the work performed by so-called white-collar employees engaged in "servicing" a business as, for, example, advising the management, planning,

negotiating, representing the company, purchasing, promoting sales, and business research and control. An employee performing such work is engaged in activities relating to the administrative operations of the business notwithstanding that he is employed as an administrative assistant to an executive in the production department of the business.

(c) As used to describe work of substantial importance to the management or operation of the business, the phrase "directly related to management policies or general business operations" is not limited to persons who participate in the formulation of management policies or in the operation of the business as a whole. Employees whose work is "directly related" to management policies or to general business operations include those work affects policy or whose responsibility it is to execute or carry it out. The phrase also includes a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business.

(1) It is not possible to lay down specific rules that will indicate the precise point at which work becomes of substantial importance to the management or operation of a business. It should be clear that the cashier of a bank performs work at a responsible level and may therefore be said to be performing work directly related to management policies or general business operations. On the other hand, the

bank teller does not. Likewise it is clear that bookkeepers, secretaries, and clerks of various kinds hold the run-of-the-mine positions in any ordinary business and are not performing work directly related to management policies or general business operations. On the other hand, a tax consultant employed either by an individual company or by a firm of consultants is ordinarily doing work of substantial importance to the management or operation of a business.

(2) An employee performing routine clerical duties obviously is not performing work of substantial importance to the management or operation of the business even though he may exercise some measure of discretion and judgment as to the manner in which he performs his clerical tasks. A messenger boy who is entrusted with carrying large sums of money or securities cannot be said to be doing work of importance to the business even though serious consequences may flow from his neglect. An employee operating very expensive equipment may cause serious loss to his employer by the improper performance of his duties. An inspector, such as, for example, an inspector for an insurance company, may cause loss to his employer by the failure to perform his job properly. But such employees, obviously, are not performing work of such substantial importance to the management or operation of the business that it can be said to be "directly related to management policies or general business operations" as that phrase is used in § 541.2.

(3) Some firms employ persons whom they describe as "statisticians." If all such a person does, in effect, is to tabulate data, he is clearly not exempt. However, if such an employee makes analyses of data and draws conclusions which are important to the determination of, or which, in fact, determine financial, merchandising, or other policy, clearly he is doing work directly related to management policies or general business operations. Similarly, a personnel employee may be a clerk at a hiring window of a plant, or he may be a man who determines or effects personnel policies affecting all the workers in the establishment. In the latter case, he is clearly doing work directly related to management policies or general business operations. These examples illustrate the two extremes. In each case, between these extreme types there are many employees whose work may be of substantial importance to the management or operation of the business, depending upon the particular facts.

(4) Another example of an employee whose work may be important to the welfare of the business is a buyer of a particular article or equipment in an industrial plant or personnel commonly called assistant buyers in retail or service establishments. Where such work is of substantial importance to the management or operation of the business, even though it may be limited to purchasing for a particular department of the business, it is directly related to management policies or general business operations.

(5) The test of "directly related to management policies or general business operations" is also met by many persons employed as advisory specialists and consultants of various kinds, credit managers, safety directors, claim agents and adjusters, wage-rate analysts, tax experts, account executives of advertising agencies, customers' brokers in stock exchange firms, promotion men, and many others.

(6) It should be noted in this connection that an employer's volume of activities may make it necessary to employ a number of employees in some of these categories. The fact that there are a number of other employees of the same employer carrying out assignments of the same relative importance or performing identical work does not affect the determination of whether they meet this test so long as the work of each such employee is of substantial importance to the management or operation of the business.

(7) In the data processing field some firms employ persons described as systems analysts and computer programers. If such employees are concerned with the planning, scheduling, and coordination of activities which are required to develop systems for processing data to obtain solutions to complex business, scientific, or engineering problems of his employer or his employer's customers, he is clearly doing work directly related to management policies or general business operations.

(d) Under § 541.2 the "management policies or general business operations" may be those of the employer or the employer's customers. For example, many bona fide administrative employees perform important functions as advisers and consultants but are employed by a concern engaged in furnishing such services for a fee. Typical instances are tax experts, labor relations consultants, financial consultants, systems analysts, or resident buyers. Such employees, if they meet the other requirements of § 541.2, qualify for exemption regardless of whether the management policies or general business operations to which their work is directly related are those of their employer's clients or customers or those of their employer.

---

29 C.F.R. § 541.206 (2003) Primary duty.

(a) The definition of "administrative" exempts only employees who are primarily engaged in the responsible work which is characteristic of employment in a bona fide administrative capacity. Thus, the employee must have as his primary duty office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or, in the case of "academic administrative personnel," the employee must have as his primary duty work that is directly related to academic administration or general academic operations of the school in whose operations he is employed.

(b) In determining whether an employee's exempt work meets the "primary duty" requirement, the principles explained in § 541.103 in the discussion of "primary duty" under the definition of "executive" are applicable.

---

29 C.F.R. § 541.208 (2003) Directly and closely related.

(a) As indicated in § 541.202, work which is directly and closely related to the performance of the work described in § 541.2 is considered exempt work. Some illustrations may be helpful in clarifying the differences between such work and work which is unrelated or only remotely related to the work described in § 541.2.

(b)(1) For purposes of illustration, the case of a high-salaried management consultant about whose exempt status as an administrative employee there is no doubt will be assumed. The particular employee is employed by a firm of consultants and performs work in which he customarily and regularly exercises discretion and independent judgment. The work consists primarily of analyzing, and recommending changes in, the business operations of his employer's client. This work falls in the category of exempt work described in § 541.2.

(2) In the course of performing that work, the consultant makes extensive notes recording the flow of work and materials through the office and plant of the client. Standing alone or separated from the

primary duty such notemaking would be routine in nature. However, this is work without which the more important work cannot be performed properly. It is "directly and closely related" to the administrative work and is therefore exempt work. Upon his return to the office of his employer the consultant personally types his report and draws, first in rough and then in final form, a proposed table of organization to be submitted with it. Although all this work may not be essential to the performance of his more important work, it is all directly and closely related to that work and should be considered exempt. While it is possible to assign the typing and final drafting to nonexempt employees and in fact it is frequently the practice to do so, it is not required as a condition of exemption that it be so delegated.

(3) Finally, if because this particular employee has a special skill in such work, he also drafts tables or organization proposed by other consultants, he would then be performing routine work wholly unrelated, or at best only remotely related, to his more important work. Under such conditions, the drafting is nonexempt.

(c) Another illustration is the credit manager who makes and administers the credit policy of his employer. Establishing credit limits for customers and authorizing the shipment of orders on credit, including the decisions to exceed or otherwise vary these limits in the case of particular customers, would be exempt work of the kind specifically described in § 541.2. Work which is directly and closely

related to these exempt duties may include such activities as checking the status of accounts to determine whether the credit limit would be exceeded by the shipment of a new order, removing credit reports from the files for analysis and writing letters giving credit data and experience to other employers or credit agencies. On the other hand, any general office or bookkeeping work is nonexempt work. For instance, posting to the accounts receivable ledger would be only remotely related to his administrative work and must be considered non-exempt.

(d) One phase of the work of an administrative assistant to a bona fide executive or administrative employee provides another illustration. The work of determining whether to answer correspondence personally, call it to his superior's attention, or route it to someone else for reply requires the exercise of discretion and independent judgment and is exempt work of the kind described in § 541.2. Opening the mail for the purpose of reading it to make the decisions indicated will be directly and closely related to the administrative work described. However, merely opening mail and placing it unread before his superior or some other person would be related only remotely, if at all, to any work requiring the exercise of discretion and independent judgment.

(e) The following additional examples may also be of value in applying these principles. A traffic manager is employed to handle the company's transportation problems. The exempt work performed by such an employee would include planning the most

economical and quickest routes for shipping merchandise to and from the plant, contracting for common-carrier and other transportation facilities, negotiating with carriers for adjustments for damages to merchandise in transit and making the necessary rearrangements resulting from delays, damages, or irregularities in transit. This employee may also spend part of his time taking city orders (for local deliveries) over the telephone. The order-taking is a routine function not directly and closely related to the exempt work and must be considered nonexempt.

(f) An office manager who does not supervise two or more employees would not meet the requirements for exemption as an executive employee but may possibly qualify for exemption as an administrative employee. Such an employee may perform administrative duties, such as the executive of the employer's credit policy, the management of the company's traffic, purchasing, and other responsible office work requiring the customary and regular exercise of discretion and judgment, which are clearly exempt. On the other hand, this office manager may perform all the bookkeeping, prepare the confidential or regular payrolls, and send out monthly statements of account. These latter activities are not directly and closely related to the exempt functions and are not exempt.

---

29 C.F.R. § 541.214 (2003) Special proviso for high salaried administrative employees.

(a) Except as otherwise noted in paragraph (b) of this section, § 541.2 contains a special proviso including within the definition of "administrative" an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week exclusive of board, lodging, or other facilities, and whose primary duty consists of either the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers, or the performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein, where the performance of such primary duty includes work requiring the exercise of discretion and independent judgment. Such a highly paid employee having such work as his or her primary duty is deemed to meet all the requirements in § 541.2(a) through (e). If an employee qualifies for exemption under this proviso, it is not necessary to test the employee's qualifications in detail under § 541.2(a) through (e).

(b) In Puerto Rico, the Virgin Islands, and American Samoa, the provisio of §541.2(e) applies to those administrative employees other than an employee of the Federal Government who are compensated on a salary or fee basis or not less than $200 per week.

29 C.F.R. § 541.201 (2009) Directly related to management or general business operations.

(a) To qualify for the administrative exemption, an employee's primary duty must be the performance of work directly related to the management or general business operations of the employer or the employer's customers. The phrase "directly related to the management or general business operations" refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.

(b) Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption.

(c) An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.

---

29 C.F.R. § 541.203 (2009) Administrative exemption examples.

(a) Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.

(b) Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the

advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

(c) An employee who leads a team of other employees assigned to complete major projects for the employer (such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements) generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.

(d) An executive assistant or administrative assistant to a business owner or senior executive of a large business generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.

(e) Human resources managers who formulate, interpret or implement employment policies and management consultants who study the operations of a business and propose changes in organization generally meet the duties requirements for the administrative exemption. However, personnel clerks who "screen" applicants to obtain data regarding their minimum qualifications and fitness for employment generally do not meet the duties requirements

for the administrative exemption. Such personnel clerks typically will reject all applicants who do not meet minimum standards for the particular job or for employment by the company. The minimum standards are usually set by the exempt human resources manager or other company officials, and the decision to hire from the group of qualified applicants who do meet the minimum standards is similarly made by the exempt human resources manager or other company officials. Thus, when the interviewing and screening functions are performed by the human resources manager or personnel manager who makes the hiring decision or makes recommendations for hiring from the pool of qualified applicants, such duties constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

(f) Purchasing agents with authority to bind the company on significant purchases generally meet the duties requirements for the administrative exemption even if they must consult with top management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs.

(g) Ordinary inspection work generally does not meet the duties requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and

skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits.

(h) Employees usually called examiners or graders, such as employees that grade lumber, generally do not meet the duties requirements for the administrative exemption. Such employees usually perform work involving the comparison of products with established standards which are frequently catalogued. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. The substitution of the employee's memory for a manual of standards does not convert the character of the work performed to exempt work requiring the exercise of discretion and independent judgment.

(i) Comparison shopping performed by an employee of a retail store who merely reports to the buyer the prices at a competitor's store does not qualify for the administrative exemption. However, the buyer who evaluates such reports on competitor prices to set the employer's prices generally meets the duties requirements for the administrative exemption.

(j) Public sector inspectors or investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees, generally do not meet the duties requirements for

the administrative exemption because their work typically does not involve work directly related to the management or general business operations of the employer. Such employees also do not qualify for the administrative exemption because their work involves the use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met.

---

29 C.F.R. § 541.700 (2009) Primary duty.

(a) To qualify for exemption under this part, an employee's "primal duty" must be the performance of exempt work. The term "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

(b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

(c) Thus, for example, assistant managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register. However, if such assistant managers are closely supervised and earn little more than the non-exempt employees, the assistant managers generally would not satisfy the primary duty requirement.

29 C.F.R. § 541.703 (2009) Directly and closely related.

(a) Work that is "directly and closely related" to the performance of exempt work is also considered exempt work. The phrase "directly and closely related" means tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work. Thus, "directly and closely related" work may include physical tasks and menial tasks that arise out of exempt duties, and the routine work without which the exempt employee's exempt work cannot be performed properly. Work "directly and closely related" to the performance of exempt duties may also include recordkeeping; monitoring and adjusting machinery; taking notes; using the computer to create documents or presentations; opening the mail for the purpose of reading it and making decisions; and using a photocopier or fax machine. Work is not "directly and closely related" if the work is remotely related or completely unrelated to exempt duties.

(b) The following examples further illustrate the type of work that is and is not normally considered as directly and closely related to exempt work:

(1) Keeping time, production or sales records for subordinates is work directly and closely related to an exempt executive's function of managing a department and supervising employees.

(2) The distribution of materials, merchandise or supplies to maintain control of the flow of and

expenditures for such items is directly and closely related to the performance of exempt duties.

(3) A supervisor who spot checks and examines the work of subordinates to determine whether they are performing their duties properly, and whether the product is satisfactory, is performing work which is directly and closely related to managerial and supervisory functions, so long as the checking is distinguishable from the work ordinarily performed by a nonexempt inspector.

(4) A supervisor who sets up a machine may be engaged in exempt work, depending upon the nature of the industry and the operation. In some cases the setup work, or adjustment of the machine for a particular job, is typically performed by the same employees who operate the machine. Such setup work is part of the production operation and is not exempt. In other cases, the setting up of the work is a highly skilled operation which the ordinary production worker or machine tender typically does not perform. In large plants, non-supervisors may perform such work. However, particularly in small plants, such work may be a regular duty of the executive and is directly and closely related to the executive's responsibility for the work performance of subordinates and for the adequacy of the final product. Under such circumstances, it is exempt work.

(5) A department manager in a retail or service establishment who walks about the sales floor observing the work of sales personnel under the

employee's supervision to determine the effectiveness of their sales techniques, checks on the quality of customer service being given, or observes customer preferences is performing work which is directly and closely related to managerial and supervisory functions.

(6) A business consultant may take extensive notes recording the flow of work and materials through the office or plant of the client; after returning to the office of the employer, the consultant may personally use the computer to type a report and create a proposed table of organization. Standing alone, or separated from the primary duty, such note-taking and typing would be routine in nature. However, because this work is necessary for analyzing the data and making recommendations, the work is directly and closely related to exempt work. While it is possible to assign note-taking and typing to nonexempt employees, and in fact it is frequently the practice to do so, delegating such routine tasks is not required as a condition of exemption.

(7) A credit manager who makes and administers the credit policy of the employer, establishes credit limits for customers, authorizes the shipment of orders on credit, and makes decisions on whether to exceed credit limits would be performing work exempt under §541.200. Work that is directly and closely related to these exempt duties may include checking the status of accounts to determine whether the credit limit would be exceeded by the shipment of a new order, removing credit reports from the files for

analysis, and writing letters giving credit data and experience to other employers or credit agencies.

(8) A traffic manager in charge of planning a company's transportation, including the most economical and quickest routes for shipping merchandise to and from the plant, contracting for common-carrier and other transportation facilities, negotiating with carriers for adjustments for damages to merchandise, and making the necessary rearrangements resulting from delays, damages or irregularities in transit, is performing exempt work. If the employee also spends part of the day taking telephone orders for local deliveries, such order-taking is a routine function and is not directly and closely related to the exempt work.

(9) An example of work directly and closely related to exempt professional duties is a chemist performing menial tasks such as cleaning a test tube in the middle of an original experiment, even though such menial tasks can be assigned to laboratory assistants.

(10) A teacher performs work directly and closely related to exempt duties when, while taking students on a field trip, the teacher drives a school van or monitors the students' behavior in a restaurant.

Federal Register, Vol. 68, No. 61, Monday, March 31, 2003, Proposed Rules

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 541

RIN 1215-AA14

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

* * *

Public Commentary and the GAO Report

Suggested changes to the part 541 regulations have been the subject of extensive public commentary for years, including a report issued by the General Accounting Office (GAO) in September 1999.

* * *

In general, the employers contacted by GAO were concerned that the regulatory tests are too complicated, confusing, and outdated for the modern work place, and create potential liability for violations when errors in classification occur.

* * *

In addition, employers believed that limiting the administrative and professional exemptions to "nonproduction" employees did not account for the effects of modern technology on employment today.

* * *

The proposed rule would also reduce the emphasis on the so-called "production versus staff" dichotomy in distinguishing between exempt and non-exempt workers, while retaining the concept that an exempt administrative employee must be engaged in work related to the management or general business operations of the employer or of the employer's customers. These changes are needed to reflect emerging case law in this area.

* * *

The administrative exemption is the most challenging of the § 13(a)(1) exemptions to define and delimit, and the "discretion and independent judgment" requirement has become increasingly difficult to apply with uniformity in the 21st century workplace.

* * *

Federal Register, Vol. 69, No. 79, Friday, April 23, 2004, Rules and Regulations

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 541

RIN 1215-AA14

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

* * *

The primary focus of most comments on subsection 541.201(a) dealt with the so-called "production

versus staff" dichotomy. The preamble to the proposal stated that the Department intended "to reduce the emphasis on the so-called 'production versus staff' dichotomy in distinguishing between exempt and nonexempt workers, while retaining the concept that an exempt administrative employee must be engaged in work related to the management or general business operations of the employer or of the employer's customers."

* * *

Many commenters, * * * strongly support the proposal's intended diminution of the production versus staff dichotomy, which they believe has little value in today's service-oriented economy.

* * *

However, many of these commenters believe that the proposal did not go far enough, and that the final rule should strive to eliminate the dichotomy entirely.

* * *

A large number of commenters have the opposite view about the "production versus staff" dichotomy, stating that minimizing or deleting the dichotomy would deprive the administrative exemption of its meaning.

* * *

They oppose any indication that the Department is minimizing the dichotomy.

* * *

Commenters, thus, have very different perspectives about how the Department should approach the "production versus staff" dichotomy and apply it to the modern workplace. Except as stated above, we have not adopted any of the commenters' suggestions for substantial changes to the primary duty standard in section 541.201(a). The Department believes that our proposal struck the proper balance on the "production versus staff" dichotomy. We do not believe that it is appropriate to eliminate the concept entirely from the administrative exemption, but neither do we believe that the dichotomy has ever been or should be a dispositive test for exemption. The Department believes that the dichotomy is still a relevant and useful tool in appropriate cases to identify employees who should be excluded from the exemption.

* * *

The Department's view that the "production versus staff" dichotomy has always been illustrative—but not dispositive—of exempt status is supported by federal case law. In *Bothell* v. *Phase Metrics, Inc.*, 299 F.3d 1120 (9th Cir. 2002), for example, the Ninth Circuit found the dichotomy "useful only to the extent that it helps clarify the phrase 'work directly related to the management policies or general business operations.'" *Id.* at 1126 (citation omitted).

* * *

The final regulation is consistent with the Ninth Circuit's approach in *Phase Metrics*: the "production

versus staff" dichotomy is "one analytical tool" that should be used "toward answering the ultimate question," and is only determinative if the work "falls squarely on the production side of the line."

* * *

These factors were taken from the existing regulations, *see* 541.205(b) 541.205(c) and 541.207(d), or developed from facts which federal courts have found relevant when determining whether an employee exercises discretion and independent judgment. Federal courts generally find that employees who meet at least two or three of these factors are exercising discretion and independent judgment, although a case-by-case analysis is required.

* * *

Hippen v. First National Bank, 1992 WL 73554, at *6 (D. Kan. 1992) (authority to commit employer in matters that have financial impact).

* * *

Consistent with existing case law, final subsection 541.203(b) provides that employees in the financial services industry "generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the

customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption." Several commenters request a section regarding various occupations in the financial services industry because of growing litigation in this area.

* * *

In contrast, the district court in *Casas* v. *Conseco Finance Corp.*, 2002 WL 507059 (D. Minn. 2002), held that loan originators were not exempt because they had a "primary duty to sell [the company's] lending products on a day-to-day basis" directly to consumers. 2002 WL 507059, at *9. The employees called potential customers from a list provided to them by the employer and, using the employer's guidelines and standard operating procedures, obtained information such as income level, home ownership history, credit history and property value; ran credit reports; forwarded the application to an underwriter; and attempted to match the customer's needs with one of Conseco's loan products. If the underwriter approved the loan, the originator gathered documents for the closing, verified the information, and ordered the title work and appraisals. The court concluded that this was the ordinary production work of Conseco, which has the business purpose of designing, creating, and selling home lending products, making them non-exempt production employees. The court also found

that the plaintiffs lacked discretion and independent judgment necessary to qualify for the exemption since they followed strict guidelines and operating procedures, and had no authority to approve loans.

* * *

Supreme Court, U.S.
FILED
APR 26 2010
OFFICE OF THE CLERK

No. 09-1160

In the Supreme Court of the United States

J.P. MORGAN CHASE & CO.,
Petitioner,

v.

ANDREW WHALEN,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For The Second Circuit

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, THE MORTGAGE BANKERS ASSOCIATION, THE AMERICAN BANKERS ASSOCIATION, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Ira D. Hammerman
Kevin M. Carroll
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Ave., N.W.
Washington, DC 20005
(202) 962-7382

Allan Dinkoff
Counsel of Record
Adam Banks
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000
allan.dinkoff@weil.com
Counsel for Amici Curiae

Additional Counsel Listed Inside Cover

Robin S. Conrad
Shane B. Kawka
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Kenneth A. Markison
MORTGAGE BANKERS
ASSOCIATION
1331 L Street, N.W.
Washington, D.C. 20005
(202) 557-2930

Gregory Taylor
AMERICAN BANKERS
ASSOCIATION
1120 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 663-5028

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

REASONS FOR GRANTING THE PETITION 5

I. The Circuits Are Divided Over the Proper Application of the Administrative Exemption to the FLSA Overtime Requirements 5

A. The Circuits Are Divided Over The Proper Use of the Administrative-Production Dichotomy 7

B. The Circuits Are Divided Over the Breadth of "Production" 9

C. The Circuits Are Divided as to Whether Payment of Incentive Compensation Is Evidence that a Job is Non-Exempt 10

II. The Division in the Circuits over the Application of the Administrative Exemption Generates Uncertainty For Employers About the Status of Jobs Traditionally Viewed as Exempt 12

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases

Acs v. Detroit Edison Co., 444 F.3d 763 (6th Cir. 2006) 11

Bothell v. Phase Metrics, Inc., 299 F.3d 1120 (9th Cir. 2002) 7, 8

Cash v. Cycle Craft Co., Inc., 508 F.3d 680 (1st Cir. 2007) 13

Fife v. Harmon, 171 F.3d 1173 (8th Cir. 1999) 11

Kennedy v. Commonwealth Edison Co., 410 F.3d 365 (7th Cir. 2005) 11

Reich v. John Alden Life Ins. Co., 126 F.3d 1 (1st Cir. 1997) 9

Roe-Midgett v. CC Servs., Inc., 512 F.3d 865 (7th Cir. 2008) 7

Schaefer v. Ind. Mich. Power Co., 358 F.3d 394 (6th Cir. 2004) 8

Shaw v. Prentice Hall Computer Publ'g, Inc., 151 F.3d 640 (7th Cir. 1998) 7, 8

Webster v. Pub. Sch. Employees of Wash., Inc., 247 F.3d 910 (9th Cir. 2001) 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes and Regulations

29 C.F.R. § 541.2 (2003) 6

29 C.F.R. § 541.205(a) 6

29 U.S.C. § 201 1

29 U.S.C. § 213(a)(1) 5

Other Authorities

Final Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 69 Fed Reg. 22,122, 22,145 (Apr. 23, 2004) 6

Jones Day, *Preparing for Increased Wage and Hour Litigation and DOL Enforcement*, Apr. 2010, http://www.jonesday.com/preparing_for_increased_wage/ 1

Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 68 Fed. Reg. 15,560, 15,566 (Mar. 31, 2003) 7

INTEREST OF *AMICI CURIAE* [1]

Amici's member firms employ tens of millions of people, many of whom are classified as "exempt" from overtime pay under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* The exempt status of employees has been subject to growing litigation over the last decade, with FLSA cases more than tripling between 2000 and 2009.[2] With this increase in litigation, employers have faced growing uncertainty as to whether their employees are properly classified. The Second Circuit's recent decision that is the subject of this petition promises to exacerbate that problem by staking out an extreme position at odds with the positions taken by the First, Sixth, Seventh, Eighth, and Ninth Circuits. The national employers represented by the *amici* here thus

---

[1] All parties have consented to the filing of this brief. The consent letters have been filed with the Court. Counsel of record for Petitioner and Respondent's counsel of record below received notice of *amici curiae*'s intent to file this brief more than ten days before the due date. Respondent's current counsel of record received notice on April 21, 2010 and consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] See Jones Day, *Preparing for Increased Wage and Hour Litigation and DOL Enforcement*, Apr. 2010, http://www.jonesday.com/preparing_for_increased_wage/ ("In the last decade, the number of cases involving FLSA claims has increased significantly, from 1,888 cases filed in federal courts in 2000 to 6,144 in 2009.").

face both conflicting rules for identical jobs in different circuits and an increase in litigation in the Second Circuit, as plaintiffs shop for the most favorable forum.

Amicus SIFMA, The Securities Industry and Financial Markets Association, brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association.

The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies, and others in the mortgage lending field.

The American Bankers Association (ABA) is the principal national trade association of the financial services industry in the United States. Its members, located in each of the fifty states and the District of Columbia, include financial institutions of all sizes and types, both federally and state chartered. ABA member banks hold the majority of the

domestic assets of the banking industry in the United States.

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country.

SUMMARY OF ARGUMENT

The FLSA exempts from overtime requirements employees who are employed in a bona fide administrative capacity, among other categories of employees not at issue here. In the case below, the Second Circuit held that an underwriter at J.P. Morgan Chase & Co., with the authority to make binding credit decisions on Chase's behalf of up to an aggregate $2.5 billion, did not fall under the FLSA's administrative exemption.

Whether an employee qualifies for the administrative exemption has been an area of growing litigation, driven in part by increasing difficulties in adapting industrial-age tests to the modern service economy. In light of these difficulties, several circuit courts of appeals have concluded that one such test, known as the "administrative-production dichotomy," should be applied only as one of several factors in determining whether a particular job fits within the administrative exemption.

In its recent decision, however, the Second Circuit departed from these other circuits and applied the administrative-production dichotomy as dispositive. Further departing from the other courts, the Second Circuit adopted a broad definition of "production," potentially sweeping in a far wider range of jobs under the overtime requirements.

The result of this division in the circuits is ambiguity and uncertainty. The same jobs that are classified as exempt from overtime in some jurisdictions may be classified as non-exempt in others. The division creates confusion, particularly for nationwide employers, like *amici*'s members, who must struggle to understand and comply with different classification standards across the country. And the division almost certainly means more, rather than less litigation.

The same is true with respect to the Second Circuit's *sui generis* approach to the question whether additional compensation can be paid for enhanced productivity without destroying the exemption. By splitting with the Sixth, Seventh, and Eighth Circuits, the Second Circuit has created an impossible situation, where national employers must either abandon such compensation entirely for otherwise exempt positions or employ a patchwork compensation structure, paying people employed in the same job differently depending on whether they work inside or outside the Second Circuit.

This Court's intervention is necessary to resolve the diverging approaches among the circuit courts and to bring needed certainty to an area of the law affecting tens of thousands of employers and millions of workers. Absent this Court's resolution of the circuit splits, *amici*'s members face conflicting and confusing rules on an important overtime exemption. This makes it difficult for them to arrive at consistent and correct decisions about their employees' overtime status, exposing them to burdensome litigation and large damage awards because the rules are just unclear.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Divided Over the Proper Application of the Administrative Exemption to the FLSA Overtime Requirements

The FLSA exempts from its overtime requirements persons who are "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). As is relevant here, applicable regulations of the Department of Labor (DOL) define an "employee employed in a bona fide . . . administrative . . . capacity" as any employee (1) who draws a salary of at least $250 a week; (2) whose "primary duty" consists of the performance of "office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers"; and (3) who "customarily and regularly exercises discretion

and independent judgment." 29 C.F.R. § 541.2 (2003).[3]

The DOL interpretive regulations describe, as one of several tools sometimes useful in determining whether work is "directly related to management policies or general business operations," a distinction between "activities relating to the administrative operations of a business" and "'production' or, in a retail or service establishment, 'sales' work." 29 C.F.R. § 541.205(a). Traditionally, courts have applied this distinction, commonly known as the "administrative-production dichotomy," only as one of several factors in the analysis of whether an employee qualifies as exempt under the FLSA's administrative exemption. The Second Circuit, however, has split from the other circuits that have considered the question, and has applied the administrative-production dichotomy as the dispositive factor, sowing uncertainty for employers operating nationwide. It compounded the confusion by adopting an expansive definition of "production" and adopting a contrary position on whether incentive compensation affects a position's exempt status. This Court's attention is necessary to resolve this important conflict.

---

[3] Effective August 2004, new DOL regulations increased the minimum salary requirement to $455 per week, but otherwise made no substantive changes to the test for the administrative exemption. See *Final Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*, 69 Fed Reg. 22,122, 22,145 (Apr. 23, 2004). *Amici*, like the Petitioner, cite to the pre-August 2004 regulations.

A. The Circuits Are Divided Over The Proper Use of the Administrative-Production Dichotomy

The administrative-production dichotomy is an industrial-age construct that DOL itself has observed "is difficult to apply uniformly in the 21st century workplace." *Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 68 Fed. Reg. 15,560, 15,566 (Mar. 31, 2003). The archetypal example of the dichotomy, the Seventh Circuit has observed, "is a factory setting where the 'production' employees work on the line running machines, while the administrative employees work in an office communicating with customers and doing paperwork." *Shaw v. Prentice Hall Computer Publ'g, Inc.*, 151 F.3d 640, 644 (7th Cir. 1998).

As a result of this "industrial age genesis," the Seventh Circuit held, the administrative-production dichotomy "is only useful by analogy in the modern service-industry context." *Roe-Midgett v. CC Servs., Inc.*, 512 F.3d 865, 872 (7th Cir. 2008). Thus, the administrative-production dichotomy is "not terribly useful" when the employee's job duties involve "neither working on a manufacturing line nor 'producing' anything in the literal sense." *Id.* at 872–73.

The Ninth Circuit has come to the same conclusion, holding that the administrative-production dichotomy is "useful only to the extent that it helps clarify the phrase 'work directly related to the management policies or general business operations.'" *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1126

(9th Cir. 2002) (internal citation omitted). Observing that the regulation from which the dichotomy comes "does not stand alone," the Ninth Circuit held that the dichotomy is "but one analytical tool, to be used only to the extent it clarifies the analysis." *Id.* at 1126, 1127. Under the Ninth Circuit's approach, the dichotomy is rarely dispositive: "Only when work falls 'squarely on the "production" side of the line,' has the administrative/production dichotomy been determinative." *Id.* at 1127.

The Sixth Circuit has followed the Seventh and Ninth Circuits in holding that the administrative-production dichotomy is not usually dispositive. "The administrative versus production analysis," the Sixth Circuit held, "does not fit all cases." *Schaefer v. Ind. Mich. Power Co.*, 358 F.3d 394, 402 (6th Cir. 2004). "The analogy—like various other parts of the interpretive regulations—is only useful to the extent that it is a helpful analogy in the case at hand, that is, to the extent it elucidates the phrase 'work directly related to the management policies or general business operations.'" *Id.* at 402–03 (citing *Bothell*, 299 F.3d at 1126; *Shaw*, 151 F.3d at 644); *see also Renfro v. Ind. Mich. Power Co.*, 370 F.3d 512, 517–18 (6th Cir. 2004).

By contrast, the Second Circuit took a divergent approach in the case at issue here. Rather than using the administrative-production dichotomy as one of several tools in the analysis, the Second Circuit applied the dichotomy as the dispositive factor in determining whether the employee was exempt under the administrative exemption, holding that "[e]mployment may thus be classified as belonging in

the administrative category, which falls squarely within the administrative exception, or as production/sales work, which does not." Pet. App. 5; see also Pet. App. 13 ("[T]he job of underwriter as it was performed at Chase falls under the category of production rather than of administrative work.").

B. The Circuits Are Divided Over the Breadth of "Production"

The circuits are also divided over how to draw the line between "production" work and "administrative" work when applying the dichotomy. The issue is of limited importance if the administrative-production dichotomy is only one of several factors in the analysis, but it becomes critically important under the Second Circuit's approach when the dichotomy is dispositive.

The First Circuit has classified jobs as "production" jobs only when they are directly related to the production of an employer's goods or services. See *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 9 (1st Cir. 1997) (production jobs "generate (i.e., 'produce') the very product or service that the employer's business offers to the public"). The Sixth Circuit has echoed this formulation, and has noted that "[w]hen employees engage in work that is ancillary to an employer's principal production activity, those employees are administrative." *Renfro*, 370 F.3d at 517 (internal quotation marks and citation omitted).

The Ninth Circuit has similarly understood that the line between "production" work and "administrative" work must be drawn narrowly. That court

has emphasized that the dichotomy must be applied "sensibly" with the goal "to clarify the meaning of 'work directly related to the management polices or general business operations,' [and] not to frustrate the purpose and spirit of the entire exemption." *Webster v. Pub. Sch. Employees of Wash., Inc.*, 247 F.3d 910, 916 (9th Cir. 2001). The Ninth Circuit also observed that there is a risk that a broad definition of "production" could "defeat the purpose of the administrative exemption," because even a company's president or CEO is somehow involved in the production of a company's products. See *id.*

The Second Circuit, by contrast, has taken a different approach, adopting a much more expansive definition of "production," holding that a job can be classified as "production" if it "*concerns* the 'production'" of the employer's fundamental product or service. See Pet. App. 12 (emphasis added). This more expansive definition of "production" sweeps a broader range of jobs into the administrative category than the narrower definition applied by the First, Sixth, and Ninth Circuits.

C. The Circuits Are Divided as to Whether Payment of Incentive Compensation Is Evidence that a Job is Non-Exempt

The circuit courts are also divided on the question whether the payment of incentive compensation is evidence that a job is a "production" job and thus is non-exempt. As Petitioner notes, the Sixth, Seventh, and Eighth Circuits have held that the payment of additional compensation beyond salary

does not render an employee non-exempt. See Pet. at 20-21.[4] The Second Circuit, however, departed from these other courts, holding that the payment of additional compensation for improved productivity was evidence that a job was a "production" job and thus non-exempt. See Pet. App. 12-13 (holding that the ability to quantify an employee's work is evidence that the job is a "production" job rather than an "administrative" job).

The Second Circuit's departure from the Sixth, Seventh, and Eighth Circuits threatens to undermine compensation systems used by numerous employers. On compensation issues in particular, national uniformity is necessary, lest employers be allowed to pay incentive compensation for enhanced productivity in some places but not in others to employees performing identical jobs. Such a patchwork compensation system is expensive to administer, unfair to the employees, and disruptive of corporate efforts to create a consistent culture throughout their organizations.

---

[4] See *Acs v. Detroit Edison Co.*, 444 F.3d 763, 768 (6th Cir. 2006); *Kennedy v. Commonwealth Edison Co.*, 410 F.3d 365, 370 (7th Cir. 2005); *Fife v. Harmon*, 171 F.3d 1173, 1175 (8th Cir. 1999).

II. The Division in the Circuits over the Application of the Administrative Exemption Generates Uncertainty For Employers About the Status of Jobs Traditionally Viewed as Exempt

The division in the circuits thus has a two-fold effect on the application of the administrative exemption. In adopting a more expansive definition of "production," the Second Circuit's approach has the potential to sweep in a broader range of jobs when applying the administrative-production distinction. And, because the Second Circuit's approach applies the administrative-production dichotomy as the determinative factor, that more expansive definition of "production" takes on greater importance than it would in the other circuits that do not apply the dichotomy as dispositive. This division thus has the potential to sow confusion among employers, particularly those operating nationwide and subject to diverging approaches to the application of the administrative-production dichotomy.

For example, consider a nationwide general manufacturer, like several of *amici*'s members, that has in-house employees who negotiate the final terms and conditions for the sales of its products to distributors and retailers after a salesperson makes the initial sale. Courts applying a relatively narrow definition of "production" might find that these employees are exempt under the administrative exemption because although they are negotiating sales of the manufacturer's products, they are not directly involved in generating the manufacturer's goods.

But under the broader definition of "production" applied in the Second Circuit, these employees may well be non-exempt. This approach might characterize the business objective of the employer as "producing" sales of the manufacturer's goods. And the employee's work in negotiating the terms and conditions of sales of the goods with potential buyers might "concern" the production of those sales. Under this analysis, these workers might be non-exempt, further complicating the efforts of a national manufacturer to comply with the FLSA's requirements with a nationwide approach.

Another example is a customer relations manager for a retail outlet. In *Cash v. Cycle Craft Co., Inc.*, 508 F.3d 680 (1st Cir. 2007), the court held that an employee of a motorcycle shop whose primary duties included ensuring that the store's motorcycles were properly outfitted and delivered, and following up with customers to "make sure they were happy with the service they were receiving" was exempt. *Id.* at 685. On these facts, the Second Circuit's analysis likely would have arrived at a different result. The customer-relations manager's duties clearly "concerned" the production of his employer's product, motorcycle sales. And applying the dichotomy as the determinative factor, as the Second Circuit has done, means that employees in such cases might be non-exempt, even if other factors pointed in the opposite direction. As a result of the Second Circuit's decision in this case, national employers, like many of *amici*'s members, who employ customer-relations workers exercising these types of job duties

now confront ambiguity about the proper classification of their employees.

A similar ambiguity faces dozens of other types of workers employed by other of *amici*'s members. For example, many of SIFMA's members offer their clients "margin" accounts, which allow clients to purchase securities without paying the entire purchase price. The amount of margin a client must post can fluctuate based on the value of the securities: if the securities decline in price, the client generally must post additional margin; if the securities appreciate, then the client may be able to access additional margin. SIFMA members employ people to approve and monitor these accounts. And, under the analysis of the Sixth, Seventh, and Ninth Circuits, these jobs have traditionally been viewed as exempt. Their duties are directly related to the management policies or general business operations of their employer, and they exercise considerable independent judgment and discretion in deciding whether to extend margin, whether to demand additional margin even if not required by the relevant regulations, and whether to grant customers additional time to meet margin calls.

The status of such workers is much more uncertain under the Second Circuit's approach that applies the administrative-production dichotomy as the dispositive factor. In applying the dichotomy, the Second Circuit explained that, in its view

> the context of a job function matters: a clothing store accountant deciding whether to issue a credit card to a con-

> sumer performs a support function auxiliary to the department store's primary function of selling clothes. An underwriter for Chase, by contrast, is directly engaged in creating "goods" – loans and other financial services – produced and sold by Chase.

Pet. App. 14.

Under the Second Circuit's analysis, it is far from clear on which side of the administrative-production line the margin account worker would fall. In some sense, the margin account workers are similar to the store accountants, deciding whether to extend credit to one of the stores' customers. On the other hand, a court might accept a plaintiff's argument that the employers' financial products are the margin accounts themselves, and thus these margin account workers are making decisions "concerning" the production of those financial products. Under the Second Circuit's analysis, therefore, these workers could potentially be non-exempt.

The ambiguity in all of these examples highlights the limited utility of the administrative-production dichotomy in the modern service economy. At times it can be informative but often it is not, and rarely is it dispositive. This is why many circuits have eschewed a bright line rule, and why the Second Circuit's approach will sow so much confusion.

One likely result of the confusion and ambiguity created by the division in the circuits is increased litigation. The Second Circuit below observed that DOL had grown increasingly troubled by the growing litigation in this area, and the divergent approaches taken by federal courts examining FLSA claims. See Pet. App. 9. Unfortunately, the Second Circuit's decision widens, rather than narrows, the disagreement among these courts, and will likely result in increased, rather than decreased, litigation over the consistent application of the FLSA exemptions. This Court's intervention is warranted to stem the tide of this growing litigation and to harmonize the approach taken by federal courts in applying the FLSA exemptions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Ira D. Hammerman
Kevin M. Carroll
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Ave N.W.
Washington, DC 20005
(202) 962-7382

Robin S. Conrad
Shane B. Kawka
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Kenneth A. Markison
MORTGAGE BANKERS ASSOCIATION
1331 L Street, N.W.
Washington, D.C. 20005
(202) 557-2930

Allan Dinkoff
Counsel of Record
Adam Banks
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000
allan.dinkoff@weil.com

Gregory Taylor
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 663-5028

Dated: April 26, 2010